Supreme Court, U. S.
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79-217

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

NO. _____

RENO-WEST COAST DISTRIBUTION CO., INC.,

Petitioner,

v.

THE MEAD CORPORATION, BLAKE MOFFITT & TOWNE, a division of Saxon Industries, Inc., NOLEX, INC., NOLAND PAPER COMPANY and SEABOARD PAPER COMPANY

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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Respondents.	)

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgments

of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on February 21, 1979 and May 17, 1979.

I

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit affirming the verdict of the District Court for the Northern District of California, entitled Reno-West Coast Distribution Co., Inc. v. The Mead Corporation, is reported in 1979-1 Trade Cases ¶ 62,544, a copy of which is attached hereto as Appendix A. The unreported Order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc, dated May 11, 1979, is attached hereto as Appendix B.

No opinion was issued by the United States District Court for the Northern District of California.

II

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 21, 1979. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing In Banc. The order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc was entered on May 11, 1979.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to the provisions of Title 28 U.S.C. Section 1254(1).

III

QUESTIONS PRESENTED

The following important questions of federal law are presented to this Court for review:

1. Was it proper for the Ninth Circuit to affirm the District Court's "rule of reason" instruction in a vertical price fixing case?

2. Was it proper for the Ninth Circuit to affirm the District Court's "rule of reason" instruction in a General Motors[1/] conspiracy case?

3. Was it proper for the Ninth Circuit to require plaintiff to anticipate this Court's reversal of the Schwinn[2/] per se rule involving vertical territorial restraints in GTE-Sylvania?[3/]

4. Was it proper for the Ninth Circuit to affirm the District Court's refusal to allow the plaintiff's Chief Executive Officer to testify as an expert concerning plaintiff's antitrust damages?

Petitioner respectfully suggests that each of these questions should be answered in the negative and that the Writ of Certiorari should issue to correct these errors.

IV

REASONS FOR GRANTING THIS WRIT

This Court has adopted stringent rules in determining the admissibility of granting petitions for certiorari. Such a petition may be granted only upon a

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1 United States v. General Motors Corporation, 384 U.S. 127 (1966).

2 United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967).

3 Continental T.V., Inc., v. GTE-Sylvania, Inc., 433 U.S. 36 (1977).

showing that important questions of federal law are in issue. There are two reasons for considering this Petition:

1. An important issue of federal antitrust law concerning the extension of this Court's GTE-Sylvania rule of reasons test to vertical price restraints should be decided by this Court; and

2. A federal question has been decided in conflict with applicable decisions by this Court where the trial Court refused a per se illegality instruction in a vertical price restraint case, which instruction was affirmed by the Court of Appeals for the Ninth Circuit.

As is discussed in greater detail below, the District Court refused to instruct the jury that vertical price restraints were per se violations of Section 1 of the Sherman Act. Additionally, the District Court refused to instruct the jury that a conspiracy between a manufacturer and its distributors to eliminate a competitive manufacturer constituted a per se violation of Section 1 of the Sherman Act. To compound this error, the Court of Appeals for the Ninth Circuit affirmed the District Court's instructions. Thus, both the District Court and the Ninth Circuit decided important federal questions in conflict with long-standing Supreme Court precedent.

Moreover, the District Court applied a rule of reason test to all of the vertical restraints proved at the

trial of this action. The Ninth Circuit affirmed the District Court's instructions, implicitly erradicating any per se rule of illegality in Sherman 1 vertical restraint cases. Thus, an important issue of federal law regarding the extent to which GTE-Sylvania's rule of reason test applies to vertical price restraints is presented to this Court for decision.

V

STATUTES INVOLVED

The statutory provisions involved are Section 1 of the Sherman Act (15 U.S.C. 1) and Section 4 of the Clayton Act (15 U.S.C. 15). The constitutional provision involved is the Fifth Amendment to the United States Constitution. These statutes and the constitutional provision are set forth in Appendix C attached hereto.

VI

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner, Reno-West Coast Distribution Co., Inc. ("RWC"), brought this action against Respondents, The Mead Corporation ("Mead"), Noland Paper Company ("Noland") and Seaboard Paper Company ("Seaboard"), along with various named and un-named co-conspirators, alleging that they had violated Section 1 of the Sherman Act by: (1) fixing and imposing upon Petitioner the prices at which RWC could resell Mead-manufactured paper products, (2) restricting the territory in which Petitioner could resell Mead-manufactured paper products; and (3) conspiring to eliminate plaintiff because of its price-cutting activities.

Petitioner alleged that such action on the part of defendants and their

co-conspirators restricted Petitioner's business, causing it damage and ultimate elimination as a competitive factor in the market place, for which anticompetitive activities Petitioner sought treble damages.

B. The Paper Merchant House Distribution System

Manufacturers of paper products, such as Mead, own timber stands, operate mills, and use a network of wholesale distributors--i.e., "merchant houses"--to resell paper products. Merchant houses, which may be either manufacturer-owned or independently owned, traditionally perform the function of warehousing and selling paper products to end-users, such as printers, book publishers, stationers, and greeting-card manufacturers.

Mead owned, in whole or in part, a substantial number of merchant houses in

the United States, including, at all times relevant hereto, Respondents Noland and Seaboard. Most "captive" merchant houses, such as Noland and Seaboard, deal primarily in the manufacturer-owner's paper products.

An "independent" merchant house, such as Petitioner, may purchase primarily from one supplier and supplement its line with products from other paper manufacturers.

C. Mead's Regional Warehousing Concept

In 1968, Mead decided to establish a regional warehouse facility in Reno, Nevada to service merchant houses in the Western United States. Mead's Western Regional Warehouse ("WRW") stored large shipments of paper products received from Mead's mills, which products were then sold to Mead's West Coast merchant houses and to their respective customers. The use of the WRW as a warehouse facility

by a merchant house could constitute significant cost savings to that merchant house by avoiding the expense of inventorying Mead's papers.

D. The Parties

1. Petitioner Reno-West Coast Distribution Co., Inc.

Petitioner, RWC, a Nevada corporation, with its principal place of business in Reno, Nevada, was incorporated on December 17, 1970, for the purpose of selling Business and Commercial ("B&C") papers manufactured by Respondent Mead.[4/]

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4 Business and Commercial papers include writing papers, printing papers, Xerographic papers and carbonless papers, usually sold to printers to make stationery, print books or magazines, or printed advertising materials. These types of papers are also sold to state and other governmental print shops.

Clerk's Transcript 660,[5/] R.Tr. 1116. RWC used Mead's WRW as its Mead inventory and sold directly to customers from that facility or by direct delivery order. C.Tr. 661. The method of distribution used by RWC was unique to the B&C industry on the West Coast. R.Tr. 1116. RWC sold paper products in Nevada and in certain limited areas of California. R.Tr. 230, C.Tr. 663, 1375-1376, PTExNo. 17.

When RWC was formed, its plans were to resell B&C papers in the Western United States, included Nevada, California, Oregon, Washington, Idaho and Arizona. PTExNos. 8 and 9. From its inception, RWC planned to become a nationwide B&C paper products wholesaler. Ibid.

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5 References herein to the Record on Appeal will be abbreviated as follows: Clerk's Transcript (C.Tr. ___); Reporter's Transcript (R.Tr. ___); Plaintiff's Trial Exhibit No. (PTExNo. ____).

2. Respondents The Mead Corporation, Seaboard Paper Company and Noland Paper Company

Mead is an Ohio corporation, having its principal offices in Dayton, Ohio. C.Tr. 660. Mead is a large, multi-national corporation having total assets in excess of $1 Billion and sales of approximately $1.032 Billion. Mead operates paper-producing mills at Chillicothe, Ohio, Kingsport, Tennessee, and Escanaba, Michigan, and is one of the largest manufacturers of B&C papers in the United States. C.Tr. 102. Mead's paper products are sold throughout the United States through Mead-owned wholesale paper merchant houses, independent wholesale merchant houses or directly to large end-user customers.

Noland, a California corporation, is a Los Angeles-based paper products

wholesaler. C.Tr. 102, 372. Until 1972, Noland was 50% owned by Mead, at which time Mead divested itself of its interest therein. C.Tr. 373. Noland competed with RWC in Southern Nevada, principally in the Las Vegas area, and would have been a potential competitor of RWC's in Southern California. R.Tr. 1105-1106, 1622, 1631-1632.

Seaboard, a California corporation, is a paper merchant house with principal offices in San Francisco, California. C.Tr. 102, 386. Seaboard is a partially-owned subsidiary of Mead. C.Tr. 387. Seaboard was a potential competitor of RWC in Northern California, including the San Francisco and Sacramento metropolitan areas. R.Tr. 233.

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VII

STATEMENT OF THE FACTS

George B. Stillwagon ("Stillwagon"), President of RWC, and Robert W. Haessler ("Haessler"), Petitioner's Vice-President, were employed by Mead until 1970. During their employment, Stillwagon and Haessler actively worked on developing Mead's WRW. R.Tr. 151-186.

In April 1970, Stillwagon began working on a proposal to start an independent merchant house selling primarily Mead paper directly from the WRW, which procedure would maximize the potential of that facility. He made his original proposal to Mead to open a merchant house sometime in August or September of 1970. R.Tr. 201; PTExNo. 8.

On October 14, 1970, R. L. Ordeman ("Ordeman"), then Mead's national sales manager, sent a copy of Stillwagon's

proposal to L. E. Pedersen ("Pedersen"), Mead's West Coast sales manager, and asked if there would be any "conflicts" with existing merchant houses. R.Tr. 842-843. PTExNo. 11.[6] Before reporting back to Ordeman, Pedersen met with Stillwagon on November 5, 1970 to discuss the proposal in greater detail. R.Tr. 853; PTExNo. 13.[7] Pedersen then reported to Ordeman that there might be some problems with Mead's California based merchant houses. R.Tr. 855-56; PTExNo. 13.

On November 11, 1970, after Stillwagon had returned from the West Coast, Ordeman and Stillwagon had a meeting in Mead's Dayton headquarters where

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6 PTExNo. 11 is attached hereto as Exhibit 1 for this Court's convenience.

7 PTExNo. 13 is attached hereto as Exhibit 2 for this Court's convenience.

Ordeman cautioned Stillwagon about conflicts with other Mead merchants on the West Coast. R.Tr. 868-87; PTExNo. 14.

Before Mead would finally agree to allow RWC to sell Mead papers, John W. Herbert ("Herbert"), then President of Mead Papers, required Stillwagon to fly to San Francisco and meet with Alfred Lindenbaum ("Lindenbaum"), then general sales manager of Seaboard--one of RWC's potential competitors--and a Mead-owned merchant house doing business in Northern California. R.Tr. 230-231. On Sunday evening, December 6, 1970, Stillwagon met Lindenbaum at the Miyako Hotel in San Francisco. R.Tr. 232. At that meeting, Lindenbaum insisted that Stillwagon stay out of Sacramento or he would not give Mead his consent to Stillwagon's proposal for RWC. R.Tr. 233, 1122-1126.

The next morning, Monday, December 7, 1970, Stillwagon met with Pedersen to tell him about the previous night's conversation with Lindenbaum. R.Tr. 1021-1422. They looked at a map showing the areas into which Stillwagon was prohibited from selling. R.Tr. 235-236. PTExNo. 17.[8/]

That same day, Pedersen, Lindenbaum and Stillwagon met for lunch at Sam's Restaurant in San Francisco where Lindenbaum and Pedersen reiterated their insistence that Stillwagon not sell into the Sacramento, California area (i.e., to the State of California's purchasing office). R.Tr. 238-240; PTExNo. 16.[9/]

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8 PTExNo. 17 is attached hereto as Exhibit 3 for this Court's convenience.

9 PTExNo. 16 is attached hereto as Exhibit 4 for this Court's convenience.

On December 10, 1970, Pedersen, in a secret memorandum, reported to Ordeman that the meeting with Lindenbaum took place and that a "tentative agreement" had been reached. Pedersen reported that neither he nor Lindenbaum had any objection to Stillwagon selling Mead papers provided RWC: "(1) . . . stays out of Sacramento, and (2). . . sticks to regular pricing and cash discount terms." PTExNo. 16.

Subsequently, Mead agreed to allow RWC to become a merchant house operating from Reno, Nevada. However, on the day Stillwagon left Mead for Reno to begin operating RWC, Herbert, cautioned him: "We cannot legally keep you from going into those territories--i.e., Sacramento, Los Angeles and San Francisco--but if you do, we can make it very difficult for you." R.Tr. 243.

By January 1, 1971, RWC was doing business out of its Reno office. R.Tr. 244. From the early months of its operations, RWC created a competitive threat to the other merchant houses on the West Coast. R.Tr. 246-271. The first to feel this competitive threat were Blake, Moffitt & Towne ("BMT"), Zellerbach Paper Company ("Zellerbach"), and Carpenter-Offett Paper Company, all of whom competed with RWC in the Reno-Carson City area. R.Tr. 235-271; PTExNos. 26, 32, 35a, 55 and 65.

Significantly, these three companies would also have been RWC's competitors had it been allowed to sell in Northern California. By using the WRW to its maximum efficiency, and by selling at list prices without the zone up-charges,[10/]

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10 The zone up-charge is equivalent to phantom freight from San Francisco, California, to Reno, Nevada.

RWC was able to offer the Reno printers a higher quality paper at a lower net price.

As RWC built a solid business base in the Reno-Carson City area, it began to solicit business in the Las Vegas area. At or about the same time, it also began to compete on State and County bid business in Nevada. R.Tr. 267-268.

Prior to bidding the State of Nevada, Stillwagon reviewed that State's public bid files and realized that he could offer the State a lower price for higher quality paper. R.Tr. 270-274. He also found that BMT and Zellerbach appeared to be rotating bids to Nevada. R.Tr. 271. Therefore, by offering competitive prices, RWC frequently was awarded State and County bids. R.Tr. 274. RWC was now ready to expand into the forbidden California markets.

The reaction to RWC's competitive impact on the Nevada market was immediate. R.Tr. 235, 1042. Zellerbach's president, Mr. Fred Whitridge, complained to Pedersen of Mead that RWC was pricing below the market and taking customers away from Zellerbach. R.Tr. 1046-1047; PTExNo. 27. Mr. John Holloway ("Holloway"), BMT's Reno sales manager, complained to his home office in San Francisco of RWC's pricing activities. PTExNOs. 26, 32, 35a, 55, 65. This complaint went to Mr. Lee Wolterding ("Wolterding"), BMT's national sales manager, who, in turn, complained to Mead. R.Tr. 254, 1038.

In addition to complaining to Mead, BMT's Holloway and Wolterding called on Stillwagon during the first half of 1971, and tried to pursuade him to add the zone up-charge to all sales in Reno-Carson City area. Stillwagon refused to be a

part of such an agreement and these BMT employees departed. R.Tr. 257-259. Pedersen contacted Stillwagon several times after the Holloway-Wolterding visit in an attempt to persuade RWC to raise its prices by reinstituting the zone up-charge, but again, Stillwagon refused to be a part of any such anticompetitive agreement. R.Tr. 260.

By August, 1971, RWC was calling on Las Vegas printers at least once a week. R.Tr. 301. Once again, RWC's competitive impact on the market was immediate; once again, the reaction was anticompetitive.

After RWC low-bid the Dunes Hotel--historically a Noland account--on printing papers, M. L. "Hat" Noland, President and Chief Executive Officer of Noland, wrote to Pedersen complaining of RWC's prices in Las Vegas. R.Tr. 301-302,

1635-1636. Additionally, a Noland salesman, Arnie Collins, gave a Mead salesman, Tom McGurn, a memorandum concerning RWC's low prices in Las Vegas. This internal Noland memorandum was then sent on to Pedersen. R.Tr. 1043; PTExNo. 39.

Subsequently, Pedersen visited RWC's offices in an attempt to pursuade Stillwagon to raise RWC's prices by adding the zone up-charge. R.Tr. 266-767. Once again, Stillwagon refused to agree to raise prices. R.Tr. 267.

During the first year of operation, RWC's sales had grown significantly. R.Tr. 267. RWC was a profitable operation, with a solid base in Nevada. R.Tr. 615 and 1059; PTExNO. 51. Moreover, by the end of 1971, Mead realized profits on its sales to RWC which made it the third most profitable per ton Mead merchant house on the West Coast. In addition, the difference

between RWC and the second place merchant house was only $1.00 per ton. PTExNo. 107.

By December, 1971, after RWC had been in business for a full year, Mead, Noland, and Seabord, as well as BMT and Zellerbach, fully realized the competitive threat that RWC posed to the price stability they had established in the market place. Moreover, RWC's threat to Noland and Seaboard impacted Mead directly as it was the part owner of the Seaboard and Noland houses and carried their credit on an extended basis. PTExNo. 106.

RWC could deliver paper out of the WRW inventory in Reno to the Sacramento market within about three hours. R.Tr. 1549. Moreover, the large San Francisco Bay Area market was only five hours away. R.Tr. 1549. The Los Angeles market, the largest in the Western United

States, was only an overnight delivery away. R.Tr. 1550.

RWC was poised in Reno prepared to invade the lucrative California market. RWC had to be stopped if Noland, Seaboard, their parent, Mead, as well as BMT and Zellerbach were to be protected.

After a series of meetings with Noland, Seaboard and BMT, Mead decided to take action to stop RWC's competitive activities in the market. PTExNos. 70, 70a, 72, 74 and 75. Mead was too sophisticated to simply terminate RWC's supply of B&C papers. It needed an excuse to accomplish its end. As Mead had done to other merchant houses in the past during Stillwagon's employment, it used credit to curb RWC's competitive activities. R.Tr. 243. RWC's open account balance served as the excuse for restricting the customers to whom RWC could sell B&C papers. PTExNos. 77, 101.

Sometime in February, 1972, Len Jones and Clifford F. Conneighton, Mead employees, came to Reno and told Still-wagon that he could sell only certain limited accounts and that RWC's credit limit with Mead was being reduced to $40,000.[11/] This restriction on RWC's sales was confirmed in a letter dated March 1, 1972, informing RWC that it could resell paper to only the following accounts: State of Nevada; Washoe County, Nevada; the Bender Warehouse; A. Carlisle & Company of Nevada; Nevada National Bank; Sierra Pacific Power Company; and the First National Bank of Nevada. R.Tr. 307-308; PTExNo. 77. Subsequently, Mead approved

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11 Astoundingly, although Mead brought Mr. Conneighton to the trial in San Francisco, when plaintiff was about to call him as a witness, Mead sent him back to Dayton, Ohio, and plaintiff was precluded from calling this key witness.

only A. Carlisle & Company of Nevada, Sierra Pacific Power Company and Art Marston Printing Company. No governmental or private end-user accounts were approved. No accounts located in Southern Nevada or California were approved. PTExNo. 101.

On January 16, 1973, RWC sent a letter to the State of California requesting that it be put on that State's bid list. R.Tr. 316; PTExNo. 92. At the same time, RWC advertised for a salesman in the Sacramento area. R.Tr. 661. Now, RWC was moving into the specifically forbidden territory. PTExNo. 16. Shortly thereafter, BMT took on that portion of the Mead line RWC had been selling. By February, 1973, plaintiff was effectively put out of business when Mead refused to sell RWC any more paper. R.Tr. 311, 319; 1399.

VIII

THE COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

On February 15, 1973, RWC commenced this action in the United States District Court for the Northern District of California. The trial of the action began before a jury on September 13, 1976. The operative historical facts, described above, including the existence of the vertical price fixing schemes and territorial restrictions were largely undisputed. See, PTExNos. 11, 13, 16 and 17. Mead's defense was primarily that Stillwagon had either imposed the restrictions upon himself, or at least had acquiesced in them and that these restraints were not per se violations of the Sherman Act.

The principal legal issues arising at the trial were, therefore:

1. whether the vertical price restraints were per se violations of Section 1 of the Sherman Act;
2. whether the vertical price and territorial restraints were per se violations of Section 1 of the Sherman Act under the then state of the law as interpreted by then valid Supreme Court precedent;
3. whether a conspiracy between the manufacturer and its distributors to eliminate the competition of a price-cutting distributor was a per se violation of Section 1 of the Sherman Act; and

4. whether the president of a corporate antitrust plaintiff can offer expert testimony regarding how he calculated his company's damages.

The District Court instructed the jury, over Petitioner's objections (C.Tr. 727), on these issues as follows:

1. vertical price and/or territorial restraints were not subject to a per se instruction (C.Tr. 1057-1063; R.Tr. 2747-2348);
2. a conspiracy to eliminate RWC because it was price-cutting and selling in the forbidden territory was not subject to a per se instruction (Ibid.); and
3. RWC's president could not testify as an expert regarding

Petitioner's damage calculations (C.Tr. 1079-1080, R.Tr. 443-448).

On October 13, 1976, the jury, on the instructions given, returned a verdict in favor of Respondents. On October 18, 1976, Petitioner filed a timely Notice of Appeal from the final judgment. C.Tr. 1224.

On February 21, 1979, the Court of Appeal for the Ninth Circuit affirmed the judgment of the District Court, holding that Petitioner should have anticipated the GTE-Sylvania change in the per se rule and should therefore have tried its case differently. See Reno-West Coast Distribution Co., Inc. v. The Mead Corporation, 1979-1 Trade Cases ¶62,544 (9th Cir. 1979). On May 11, 1979, the Court of Appeal for the Ninth Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc.

IX

SUMMARY OF ARGUMENT

The District Court refused Petitioner's request for a jury instruction that vertical price restraints were per se violations of Section 1 of the Sherman Act, which Petitioner asserts constituted reversible error. Additionally, Petitioner urged the District Court to instruct the jury that vertical restraints involving both resale price fixing and territorial restrictions constituted a per se violation of Section 1 of the Sherman Act. The District Court's refusal to so instruct the jury, Petitioner asserts, constituted reversible error.

Petitioner further requested the District Court to instruct the jury that a conspiracy between a manufacturer and its distributors to eliminate the competition of a price-cutting distributor constituted

a per se violation of Section 1 of the Sherman Act. The failure to so instruct the jury was reversible error, which was compounded by the Ninth Circuit's affirmation of the District Court's judgment.

Petitioner also urged the District Court pre-GTE-Sylvania to instruct the jury that vertical territorial restrictions were per se violations of Section 1 of the Sherman Act. The District Court refused such an instruction and the Ninth Circuit affirmed post-GTE-Sylvania holding that Petitioner should have anticipated this Court's reversal of the Schwinn per se rule. Petitioner claims that such a holding by the Ninth Circuit is unconstitutional in that Petitioner has been denied due process of law.

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ARGUMENT

A. Vertical Price Restraints are Per Se Violations of Section 1 of the Sherman Act

1. Vertical Price Fixing Standing Alone is Per Se Illegal

There is undisputed evidence that Petitioner was the victim of a vertical price fixing scheme. Mead's own corporate records show that RWC was required to " . . stick to regular pricing and discount terms". PTExNo. 16. The uncontroverted testimony is overwhelming that Petitioner was eliminated as a competitor because of its refusal to maintain resale prices.

Such activity is a per se violation of Section 1 of the Sherman Act. Long ago, this Court determined that vertical price restraints were so destructive

of competition that they should be subjected to the per se illegality rule. See, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. Line Material Co., 333 U.S. 287 (1948); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); United States v. Univis Lens Co., 316 U.S. 241 (1942); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); and Jessie Isidor Straus v. Victor Talking Machine Co., 243 U.S. 490 (1919).

During the course of the trial in this case, Petitioner requested that the District Court give the following per se jury instruction:

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> [S]hould you find that the defendant Mead, either alone or in concert with any of the other defendants or co-conspirators . . . [maintained] resale prices . . . then the defendants would have violated the antitrust laws in the manner charged by the plaintiff, and you must find for the plaintiff. C.Tr. 633 (Emphasis added).

The District Court rejected this instruction, but rather told the jury that the only way liability could be established was where there was proof of a horizontal price fixing agreement between all the defendants. C.TR. 1072. Thus, the entire issue of a vertical price restraint was not included in any instruction the District Court gave the jury.

The failure of the District Court to give such an instruction was clearly reversible error. Moreover, the Ninth Circuit compounded that error by giving its imprimatur to the District

Court's refusal to instruct the jury that vertical price restraints are per se illegal.

Thus, both the District Court and the Ninth Circuit decided a federal question of antitrust law in direct conflict with applicable decisions of this Court, and this Writ of Certiorari should be granted to correct that error.

2. A Combination of Vertical Price and Territorial Restraints are Per Se Illegal

Prior to this Court's GTE-Sylvania decision, vertical territorial restrictions were subject to a per se illegality rule under Schwinn. However, although GTE-Sylvania may have reversed Schwinn's per se rule as it applied to purely territorial restrictions, it did not affect that rule when vertical price restraints are part and parcel of the

total restraint. See, United States v. Sealy, Inc., 388 U.S. 350 (1967); Serta Associates, Inc. v. United States, 393 U.S. 534 (1969).

Here the evidence demonstrates that prior to Petitioner's entry into the market, Respondents conferred to determine whether Petitioner would create any "conflicts" with their pre-conceived and well-established market structure.

Only after Respondents fixed Petitioner's territory and prices was Petitioner enfranchised to sell Mead's products. Such activity is a per se violation of Section 1 of the Sherman Act and the District Court's refusal to so instruct the jury constituted reversible error, which was compounded by the Ninth Circuit's affirmance of the trial court. As the decisions below are in direct conflict with this Court's applicable

precedent, Petitioner respectfully suggests that the Writ of Certiorari should be granted to correct this error.

B. Refusal to Give the General Motors Per Se Instruction was Reversible Error

At the time of trial, this Court's opinion in Schwinn was still the law concerning manufacturer-imposed vertical territorial restraints. As this case involved both a territorial and price restraint imposed by the manufacturer acting in concert with the merchant house defendants on the same level of distribution as RWC, Petitioner requested that the District Court give a combined Schwinn/General Motors instruction. C.Tr. 681-688. This request was rejected.

Contrary to the Ninth Circuit's contention, this Court's recent GTE-Sylvania decision does not dispose of the

issue of the propriety of a per se instruction in this litigation. GTE-Sylvania concerned restrictions on the location of a franchisee's place of business imposed by the franchisor acting alone. Likewise, in reconsidering the Schwinn doctrine, this Court was addressing itself to the question of vertical territorial restraints imposed upon all distributors by a manufacturer acting alone and not as part of an anti-trust conspiracy. In this case, Mead's territorial restraints were imposed pursuant to a conspiracy with Petitioner's direct competitors with the express intent to limit Petitioner's ability to compete in a seven state marketing area.

Where, as here, there was substantial evidence of a conspiracy between Mead and RWC's competitors to restrict territories, maintain resale

prices, and to eliminate RWC as a competitor, the per se rule should apply.

There is no dispute that the existence of such a conspiracy is a per se violation of Section 1 of the Sherman Act under this Court's holding in United States v. General Motors Corporation, 384 U.S. 127 (1966) and United States v. Topco Associates, Inc., 405 U.S. 596 (1972), and the Ninth Circuit's ruling in Girardi v. Gates Rubber Company Sales Division, Inc., 325 F.2d 196 (9th Cir. 1963).

Therefore, at the trial, RWC requested that the Court give the jury the following per se instruction:

* * *

> [S]hould you further find that the defendant Mead, either alone or in concert with any of the other defendants or co-conspirators, restricted the area in which plaintiff could re-sell B&C papers, or the customers to whom plaintiff could re-sell B&C papers, or that resale prices

were maintained, then the defendants would have violated the antitrust laws in the manner charged by the plaintiff, and you must find for the plaintiff. (C.Tr. 633).

The District Court refused to give that instruction, but instead instructed the jury that a conspiracy to eliminate Petitioner would " . . . not violate the antitrust laws unless it had an unreasonable anticompetitive purpose or effect." C.Tr. 1062, R.Tr. 2350. This instruction is directly contrary to this Court's General Motors' decision, as reaffirmed in GTE-Sylvania. The refusal by the District Court to instruct the jury on the per se illegality of such a restraint as is present here was reversible error and the Ninth Circuit's affirmance of the District Court merely compounded that error.

As has been pointed out, this case differs from Schwinn and GTE-Sylvania in that it involves resale price restrictions imposed by Mead acting in concert with RWC's competitors -- Seaboard and Noland. In GTE-Sylvania, this Court specifically confirmed the viability of the per se rule with regard to vertical price restrictions imposed by the manufacturer alone:

> As in Schwinn, we are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. 97 S.Ct. 2558, fn. 18. (Emphasis added.)

Again, this Court excepted concerted anticompetitive schemes from the unilateral, vertical, purely territorial restraints in GTE-Sylvania. Citing General Motors, with approval, this Court said:

> There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal per se. 97 S.Ct. 2562.

By the overwhelming preponderance of the evidence, RWC demonstrated at the trial that at its inception, its territory and resale price was restricted by Mead, in concert with the merchant house defendants. PTExNo. 16 and 17. RWC first ignored the restriction to maintain "regular pricing" by eliminating the zone up-charge on paper sales in Nevada. R.Tr. 240-271. Petitioner then ignored the restriction on resale territory by venturing into the forbidden areas of California. R.Tr. 316; PTExNo. 92. Mead, after receiving complaints from the merchant house defendants applied pressure to RWC in an attempt to convince Petitioner

to raise prices. R.Tr. 266-267; 1046-1047, 254, 1038, 301-302, 1635-1636, 1043, and PTEXNo. 39. When RWC refused to yield to Mead's pressure, Petitioner was finally eliminated as a competitive factor in the market place.

These facts, Petitioner respectfully suggests, established a per se violation of Section 1 of the Sherman Act and the District Court's refusal to so instruct the jury constituted reversible error which should be cured by this Court because this case should be governed by the per se test ennumerated in General Motors and Girardi.

In General Motors, supra, a group of Chevrolet dealers complained to GM that other dealers were cutting prices and selling at discounts. GM, in concert with the non-price cutting dealers, terminated the price cutting dealers. This

Court condemned that anticompetitive action, saying:

> We have here a classic conspiracy in restraint of trade: joint collaborative action by dealers, the appellee associations and General Motors to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet Dealers and to deprive franchised dealers of their freedom to deal through discounts if they so choose. United States v. General Motors Corp., 384 U.S. 127, at 140 (1966).

In Girardi, supra, the defendant manufacturer, in response to one other distributor's complaint about plaintiff's competitive pricing activities, terminated plaintiff. In condemning this action as a per se violation of Section 1 of the Sherman Act, the Ninth Circuit, at pages 203-204 said:

> We think that the evidence in this case was sufficient to permit the jury properly to draw the inference that Oranges complained to Gates about Girardi's price cutting; that in making those complaints

> Oranges was expecting Gates to take action to put an end to that price cutting and thus relieve Oranges as Girardi's competitor from the adverse effects of a price eroding policy on the part of Girardi. That Gates acquiesced in this and by its conduct carried out a program jointly with Oranges to put an end to this price erosion; that when Oranges sought assistance from Gates he knew of Gates' fixed policy of refusing to sell to those who did not adhere to schedule of prices and expected that Gates would exercise the control over Girardi that Gates' representative indicated could be exercised over the marketing prices of Jones if Jones were given a contract.
>
> It is therefore our view that the trial court was in error in taking the case from the jury and dismissing the action.

In this case the evidence demonstrated that such a classic conspiracy existed. Mead's officers met with officers of the other Respondents and named co-conspirators prior to entering into the merchant house agreement with RWC and later kept these competitive merchant

houses informed of RWC's activities. PTExNos. 12, 15, 19, 27, 38, 40, 48, 68, 92 and 102. Moreover, there is direct evidence that Mead required the approval of Seaboard, its Northern California wholesaler, for the territory and pricing policies it forced on RWC. PTExNos. 12, 15, 16 and 19. The evidence proved that BMT, Seaboard, and Noland pressured Mead to force RWC to get in line with then prevailing market prices. Mead subsequently attempted to persuade RWC to adjust its price upward to include the zone up-charge. R.Tr. 235-260, 267, 903-904, 1377-1381; PTExNo. 16. When RWC out-bid Noland at the Dunes Hotel in Las Vegas, Noland complained to Mead, who took action to preclude RWC from selling in Las Vegas. R.Tr. 265-266, 307, 905-906, 1634-1637; PTExNo. 77. When RWC went into the forbidden areas of California, Mead terminated RWC.

R.Tr. 313, 662-663, 670; PTExNos. 96a, and 97.

The facts support Petitioner's claim that Mead and the other merchant house Respondents conspired to eliminate RWC as a competitive factor in the market place. The existence of the manufacturer as a co-conspirator, and the primary enforcer of the restrictions, does not undermine the horizontal nature of such a conspiracy. See, United States v. General Motors Corp., supra; United States v. Topco Associates, Inc., supra.

Such a conspiracy to allocate territories in order to minimize competition is one of the classic examples of a per se violation of Section 1 of the Sherman Act. See White Motor Co. v. United States, 372 U.S. 253, 263 (1963); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Northern

Pacific Railway Co. v. United States, 356 U.S. 1 (1958); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); United States v. Sealy, Inc., 388 U.S. 350 (1967); United States v. Arnold, Schwinn & Co., supra; Serta Associates, Inc. v. United States, 393 U.S. 534 (1969).

Such a conspiracy is precisely what the evidence demonstrates occurred here. Seaboard's approval was necessary for Petitioner to even obtain the original authorization to become a Mead merchant, and that approval was contingent upon Stillwagon's coerced agreement to "stay out of Sacramento" and "stick to regular pricing" and "cash discount terms." PTExNo. 16.

Therefore, the District Court's refusal to instruct the jury that these activities were per se unlawful under Section 1 of the Sherman Act constituted

reversible error and the Court of Appeal's affirmation of that action compounded the error. This Court should now grant the Petition for a Writ of Certiorari to correct this conflict with applicable Supreme Court precedent.

C. The Vertical Restraints Proved in this Litigation are Per Se Violations of Section 1 of the Sherman Act

At the close of the evidence, the District Court rejected Petitioner's instruction that a vertical territorial restriction such as that proved here constituted a per se violation of Section 1 of the Sherman Act. C.Tr. 681-682. Rather, the District Court instructed the jury that they had to consider "the reason for adopting the particular practice which is alleged to be a restraint" of trade when considering whether the "particular restraint is reasonable or unreasonable."

C.Tr. 1057. The District Court went on to instruct the jury:

> If you find that Mead imposed and enforced a territorial restriction, you must determine whether it was justified by determining whether it was unreasonable for Mead to do so. The factors you may use to decide the reasonableness of any restriction you may find include:
>
> (1) the facts and conditions of the business of distributing fine papers;
>
> (2) the reasons Mead had for adopting the restraint; and
>
> (3) the nature of the restraint and its actual or probable effect on the business of RWC and on the fine papers market. (C.Tr. 1058).

The District Court's error was compounded when it then instructed the jury, over Petitioner's objection (C.Tr. 727) that: "(1) . . . [n]ot every act in restraint of trade is illegal under the Sherman Act, but only when it is a result of a combination, contract or conspiracy . . ."

(C.Tr. 1054), thereby completely eliminating from antitrust scrutiny the manufacturer-imposed, vertical restraints present here; and (2) the Respondents would not be liable if " . . . [Petitioner] proposed and agreed to the area established by RWC, and [was] therefore involved in the very agreement RWC now claims is illegal" (C.Tr. 1059), thereby resurrecting the in pari delicto defense buried by this Court in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968).

The evidence in this action demonstrates that Mead prevented RWC from reselling Mead paper outside the State of Nevada and a small portion of California. Additionally, the evidence shows that after RWC violated the restriction and penetrated forbidden markets, Mead, in concert with the other respondents, terminated RWC.

Such vertical restrictions on the territory in which a distributor may sell a manufacturer's product had, prior to GTE-Sylvania, been consistently held to be per se violations of Section 1 of the Sherman Act. See United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); Noble v. McClatchy Newspapers, 533 F.2d 1081 (9th Cir. 1975); rehearing denied, 537 F.2d 1030 (9th Cir. 1976).

This rule, prior to GTE-Sylvania, was consistently followed in the Ninth Circuit as well as in other Circuit and District Courts. See Noble v. McClatchy Newspapers, supra; Pitchford v. PEPI, Inc., 1975-2 Trade Cases ¶60,653 (3d Cir. 1975); Adolph Coors Co. v. FTC, 497 F.2d 1178 (10th Cir. 1974), cert. denied, 419 U.S. 1105 (1975); Hensley Equipment Co. v. Esco Corp., 383 F.2d 252 (5th Cir 1967); Adolph Coors Co. v. A&S Wholesalers, Inc.,

1975-1 Trade Cases ¶60,187 (D.Colo. 1975); Eastex Aviation, Inc. v. Sperry & Hutchinson Co., 367 F.Supp. 868 (E.D. Tex. 1973), aff'd 1975-2 Trade Cases ¶60,585 (5th Cir. 1976); J.N. Cook v. Ralston Purina Co., 366 F.Supp. 999 (M.D.Ga. 1973); Dobbins v. Kawasaki Motors Corp., U.S.A., 362 F.Supp. 54 (D.Ore. 1973); Mid-America ICCE, Inc. v. Mitchell Co., 1973-2 Trade Cases ¶74,681 (D.Ore. 1973); Lepore v. New York News, 346 F.Supp. 755 (S.D.N.Y. 1972); United States v. Glaxo Group Ltd., 302 F.Supp. 1 (D.D.C. 1969), rev'd on other grounds, 410 U.S. 52 (1973); and Sherman v. Weber Dental Manufacturing Co., 285 F.Supp. 114 (E.D.Pa 1968).

Since this Court handed down its GTE-Sylvania decision, District Court's have been subjecting all varieties of vertical restraints to the rule of reason test enunciated in the GTE-Sylvania "location

clause" case, thus eradicating the per se test in all vertical restraint cases. Petitioner respectfully suggests that now is the time for this Court to clarify its GTE-Sylvania decision so that lower Courts do not expand the rule of reason test into vertical price and territory restriction cases with impunity. An analysis of this Court's GTE-Sylvania decision underscores its limitations to purely vertical territorial restraints. GTE-Sylvania involved an analysis of a vertical restriction placed on a retailer by a manufacturer from selling that manufacturer's products from a location other than that specified in the franchise agreement. 97 S.Ct. 2551. Significantly, GTE-Sylvania was only a marginal competitor in the national television market when it embarked on its change in distribution for purposes of increasing its market position. 97 S.Ct.

2551-2552. In order to increase its market share, GTE-Sylvania independently decided to limit the number of its retailers and the location from which each could sell his Sylvania manufactured products. 97 S.Ct. 2552.

To the contrary, here the territorial restriction was established as part of an anticompetitive agreement between a viable, dominant manufacturer, Mead, and its partially-owned merchant house, Seaboard, a potential RWC competitor.

After GTE-Sylvania established a competing retailer in Continental's San Francisco territory, Continental moved its San Jose based merchandise into the Sacramento area, for which violation of its franchise agreement GTE-Sylvania terminated its contract. 97 S.Ct. 2552-2553. Continental claimed such action was a per se violation of Section 1 of the Sherman Act.

At the close of the trial, GTE-Sylvania sought a rule of reason instruction on the territorial retraints while Continental requested a per se instruction. The District Court gave the latter and, after an adverse judgment, GTE-Sylvania appealed. 97 S.Ct. 2553. The Ninth Circuit, sitting en banc, reversed, holding that the nature of the restraint when viewed in relation to GTE-Sylvania's market share required a rule of reason instruction. 97 S.Ct. 2553. This Court granted certiorari to decide this important antitrust issue. 97 S.Ct. 2554.

Although this Court held that the per se rule ennumerated in Schwinn should be examined under the standards set forth in Northern Pacific,[12/] it reiterated

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12 Northern Pacific Railroad Co. v. United States, 356 U.S. 1 (1958).

the per se rule where the vertical restraints involved price. 97 S.Ct. 2558-2559, fn. 18. One of the key factors in this Court's GTE-Sylvania decision was that the restraint was on retailers so that the impact on the consuming public was minimal. 97 S.Ct. 2560. Here, the restriction placed on RWC affected a seven state area and resale prices. Thus, the impact on the end-user is maximized.

This Court specifically held GTE-Sylvania to non-price vertical restraints, while it also recognized that vertical/horizontal type restrictions were still per se violations under General Motors and Topco. 97 S.Ct. 2562, fn. 28. Additionally, this Court stressed that it did " . . . not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibitions under . . . " Northern Pacific. 97 S.Ct. 2562. However,

inferior Federal Courts have expanded the GTE-Sylvania rule of reason test to all varieties of vertical restraints.

In the present case, an important question of federal antitrust law exists concerning the application of, and justification for, a per se rule of illegality where the restraint involves a manufacturer and other distributors in the imposition of price and territorial restraints on a competing distributor. The rule of reason test is improper under such circumstances and that fact should be made clear to lower courts who have interpreted GTE-Sylvania as confirming an open season on the per se rule as applied to all varieties of vertical restraints.

D. The Ninth Circuit's "Anticipation" Rule Denies Petitioner Due Process of Law

Petitioner's constitutionally-protected right to a fair trial has been invaded.

At the time this case was being tried to a jury, the prevailing precedent was that a vertical territorial restraint imposed by a manufacturer upon its wholesale distributors was a per se violation of Section 1 of the Sherman Act. That was the rule of Schwinn as it existed in September, 1976.

As any trial counsel knows, certain decisions regarding the type and kind of evidence to be offered as well as legal theories, must be made at the time of trial based upon the state of the law at that time. In September, 1976, the state of the law was that the Schwinn per se rule was a viable legal principal. Thus, at the time of trial, Petitioner offered evidence of a per se violation of

Section 1 of the Sherman Act. Petitioner did not approach the trial of its action by offering evidence of the reasonableness of the Mead-imposed vertical restraints because no such evidence was necessary at that point in time.

Thus, in September, 1976, when the District Court gave the jury a rule of reason instruction on these vertical restraints, Petitioner objected to the instructions and looked to the appellate courts to correct that error. However, between the conclusion of the trial and the appellate hearing in the Ninth Circuit, this Court decided GTE-Sylvania which radically changed the test applied to certain vertical territorial restraints from per se violations of Section 1 of the Sherman Act to one subjected to a rule of reason.

Thus, the Ninth Circuit, faced with this dilemma, opted for affirming the District Court's instruction holding that Petitioner should have anticipated, or second-guessed, this Court's reversal of the Schwinn per se rule in GTE-Sylvania.

At the time Petitioner was actually trying this case to a jury in September, 1976, the per se rule in Schwinn was still a viable rule of anti-trust law. GTE-Sylvania had not been decided by this Court. In fact, in Noble v. McClatchy Newspapers, 537 F.2d 1030 (9th Cir. 1976), the Court of Appeals for the Ninth Circuit on May 20, 1976 -- only four months before the trial in this case -- apparently rejected a rule of reason test in cases other than those involving "location clauses." Thus, as far as Petitioner could determine at the time of trial, vertical territorial

restraints were per se illegal under Schwinn and McClatchy. Additionally, at the time of trial, General Motors was -- and still is -- a viable per se rule of antitrust law. Petitioner, therefore, had to operate within this framework in trying its case.

Faced with a decade of overwhelming Supreme Court authority, Petitioner tried a per se case, offering no evidence on the issue of whether the vertical territorial and price restraints were "unreasonable. Petitioner also stood on its per se jury instruction because that was the law at the time this action was tried to the jury and if the District Court committed error in refusing that instruction, an appeal was always available to cure that error. Now, with the advantage of hindsight, Petitioner has been told by the Court of Appeals for the Ninth

Circuit that it should have anticipated, or second-guessed, this Court's GTE-Sylvania decision and, therefore, should have tried its case differently.

Petitioner respectfully suggests that such a rule is tantamount to a denial of its constitutionally protected due process rights.

Additionally -- and significantly -- contrary to the Court of Appeals' statements, Petitioner did not have any "input" into the final instructions read to the jury, as the District Court did not allow Petitioner -- or Respondents, for that matter -- to review those instructions prior to giving them to the jury. R.Tr. 2203-2204. Thus, again, Petitioner could not have had an impact on the wording of the liability instructions given to the jury.

Petitioner respectfully suggests that because of these facts, it would be unfair to preclude RWC from retrying its case to a jury given proper instructions and allowing Petitioner to then offer evidence concerning the issue of whether the vertical territorial restraints were unreasonable.

Therefore, this Court should grant the Writ of Certiorari to correct this infringement on Petitioner's constitutionally-protected rights.

E. Refusal to Allow RWC's President to Testify as an Expert on Damages was Reversible Error

It is no longer open to question that an officer of a corporate antitrust plaintiff can testify concerning the damages suffered by his company. See Pacific Coast Agricultural Export Ass'n. v.

Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975).

However, in this case, although the District Court allowed Stillwagon, RWC's president, to testify to the fact of damage and to give his opinion of the amount of damage, the District Court prevented Stillwagon from testifying as to how Petitioner's damage theory was developed or what factors were considered to arrive at the amount of damages.

Petitioner's damages were based upon a market analysis of the areas in which RWC was precluded from selling paper and projecting from RWC's known growth in Nevada what share of the forbidden market it could have maintained absent the restriction. PTExNo. 110.

This method of calculating damages has been approved by this Court and the Ninth Circuit. See Hazeltine

Research, Inc. v. Zenith Radio Corp., 239 F.Supp. 51 (N.D.Ill. 1965), rev'd on other grounds, 388 F.2d 25, 36 (7th Cir. 1967); rev'd on other grounds, 395 U.S. 100 (1969); Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., supra. Petitioner offered a computerized analysis of its damages allowing for different growth factors and market conditions. PTExNo. 110. The figures used in this analysis were derived by Stillwagon.

The uncontradicted evidence demonstrated that Stillwagon possessed the expertise to make such market analysis and to project sales of paper products into new markets. R.Tr. 103-121. This expertise was developed in his educational background in both Psychology and Engineering and his post-graduate employment. R.Tr. 105. Stillwagon functioned in this capacity

while employed by Mead, most notably in his study of market conditions that led to establishing Mead's WRW. R.Tr. 103-121; PTExNos. 103, 104.

Stillwagon also worked on planning problems involving paper sales in a particular market and their impact on corporate profits. R.Tr. 107.

Just prior to leaving Mead, while an assistant to a corporate vice-president, Stillwagon worked on a project to evaluate the projected effect of decentralizing Mead's paper sales. R.Tr. 119-121. To accomplish this evaluation, Stillwagon measured the performance of manufacturing units, service units, inside sales groups, the scheduling and inventory department as they impact a specific market. R.Tr. 121. He also continued with his study of product mixes as a function of profitability to isolate

which specific geographic and product market offered the greatest opportunity for increasing corporate profits. R.Tr. 121.

At the time of trial, Stillwagon was Director of Operations for Crown Zellerbach Corporation ("Crown") working on a paper distribution project to open new market opportunities for paper products produced by Crown's mills and distributed by Zellerbach Paper Company. R.Tr. 103-104.

Stillwagon also worked on Crown's marketing plan --i.e., correlating market distribution, pricing and service; he also developed Crown's strategy for penetrating a particular target market. R.Tr. 104-105.

This is precisely the kind of analysis Stillwagon made to project RWC's damages and about which the District Court refused to allow him to give expert testimony.

PTExNo. 110. The District Court restricted Stillwagon's testimony as a non-expert businessman to the following questions: (1) what percentage of the market Petitioner enjoyed in Nevada; (2) what percentage of the market Petitioner could have captured in the restricted areas; and (3) the gross receipts for sales in that restricted area and the estimated profits from those anticipated sales. R.Tr. 443. The District Court further restricted Stillwagon's testimony to merely giving a gross figure without explaining to the jury how that amount was calculated. Stillwagon was not permitted to testify as to how his damage projections and calculations were made, even though he was the one who actually made those projections. R.Tr. 433. Thus, because the District Court would not allow Stillwagon to testify as to how the damage figures were calculated, the District

Court then struck Petitioner's damage study because it lacked sufficient foundation for its introduction into evidence!

The District Court's ruling was directly contrary to the Sunkist decision, where the plaintiffs themselves were allowed to give opinion testimony under Rules 701 and 702 of the Federal Rules of Evidence based on their experiences as businessmen as to their damages. The Sunkist plaintiffs were also allowed to project their pre-1966 market shares into the post-1966 Hong Kong market. Id. at 1206-1207. The Ninth Circuit specifically approved this method of calculating and projecting damages:

> While plaintiff's evidence as to the causes of the change in market scope was not overwhelming, it was sufficient to make a "just and reasonable estimate of the damage" by the jury. 326 U.S. at 264, 66 S.Ct. at 580. A defendant whose wrongful conduct has rendered difficult

> the ascertainment of the amount of damages suffered may not complain that they cannot be measured with exactness and precision. Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U.S. 359, 379 46 S.Ct. 400, 71 L.Ed. 684 (1927); Hobart Brothers Co. v. Gilliland, 471 F.2d 784, 903 (5th Cir. 1973). Id., at 1207.

The Ninth Circuit's ruling in Sunkist is consistent with Rule 701 of the Federal Rules of Evidence, which would allow an officer of an antitrust plaintiff to give an opinion which is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."

Experience alone will qualify a person to testify as an expert. There is no doubt that Stillwagon was experienced in projecting future sales into hitherto untapped markets. He was, therefore, qualified to testify as to RWC's sales

projections and how he made those projections. See, Hazeltine Research, Inc. v. Zenith Radio Corporation, supra [Zenith's president, vice-president and manager allowed to make market projections]; William H. Rankin Co. v. Associated Bill Posters of United States and Canada, 42 F.2d 152, 155 (2nd Cir. 1930) [plaintiff was allowed to show by the testimony of his treasurer what he considered would have been the normal increase of his business from year to year; the witness testified from his knowledge of the business' history]; Story Parchment Company v. Paterson Parchment Paper Company, 282 U.S. 555 (1931) [plaintiff's treasurer allowed to estimate damages]; Eastman Kodak Company v. Southern Photo Materials Co., 295 F. 98 (5th Cir. 1923); affirmed, 273 U.S. 359 (1927) [plaintiff's officer allowed to give opinion on damages]. See also, Kestenbaum v.

Falstaff Brewing Corp., 514 F.2d 690 (5th Cir. 1975) [plaintiff's owner could estimate lost value of company]; Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959) [plaintiff's officer could give opinion on lost profits]; and Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir. 1964) [officer of plaintiff allowed to testify to estimated damages].

The uncontroverted evidence at trial regarding Stillwagon's long-time involvement with the paper industry and especially in making these same kinds of calculations demanded that he should have been allowed to testify as an expert regarding his company's damages and how he arrived at the damage figures.

Citing this Circuit's Hazeltine opinion as authority, the Ninth Circuit recently allowed a businessman to testify

as an expert with regard to a projected market share as damages:

> Plaintiff's expert witness who testified at the trial on damages were properly qualified as experienced businessmen capable of providing information and opinions based on practical experience. See Hazeltine Research, Inc. v. Zenith Radio Corp., 239 F.Supp 51, 97 (N.D.Ill. 1965), rev'd on other grounds, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). Pacific Coast Agricultural Export Ass'n. v. Sunkist Growers, Inc., 526 F.2d 1196, 1207, (9th Cir. 1975).

Thus, Stillwagon, under the overwhelming weight of authority, should have been allowed to testify as an expert witness, not only as to the amount of damages suffered by RWC, but also as to how those damages were calculated so that the jury was not left to believe the Petitioner's damage figures were mere speculation on Stillwagon's part.

Stillwagon also qualified as an expert witness under Rule 702 of the Federal Rules of Evidence, which provides that if ". . . technical, or other specialized knowledge . . ." will assist the jury in understanding the evidence or to determine a fact in issue, ". . . a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

A person can be qualified as an expert by education in the field or by practical experience in the field. See, Southern Cement Company v. Sproul, 378 F.2d 48 (5th Cir. 1967); see also Holmgren v. Massey-Ferguson, Inc., 516 F.2d 856 (8th Cir. 1975). One is not to be preferred over the other. If practical experience is present, then professional education in the field is not necessary. See, Tank v.

Commissioner of Internal Revenue, 270 F.2d 477 (6th Cir. 1959) [property appraisal without certificate from Real Estate Board]; Bratt v. Western Air Lines, 155 F.2d 850 (10th Cir. 1946) [mechanic without degree in aerodynamics gave opinion concerning which part of plane's structure failed first in flight]; United States v. 60.14 Acres of Land, 362 F.2d 660 (3rd Cir. 1966) [real estate appraiser testified as to value without having any comparable sales experience]; Chicago, Great Western Ry. Co. v. Beecher, 150 F.2d 394 (8th Cir. 1945) cert. den. 326 U.S. 781 (1945) [fireman and engineer's expert opinion on train's ability to stop].

The District Court's refusal to permit Stillwagon to testify as an expert under the provisions of Rule 702 seemed to be arbitrarily based upon the fact that Stillwagon was also the president of the

plaintiff. The Tenth Circuit held in Grain Dealer Mutual Insurance Co. v. Farmer's Union Cooperative Elevator & Shipping Association, 377 F.2d 672 (10th Cir. 1967) that a party otherwise qualified as an expert is not disqualified by virtue of his interest in the litigation.

Stillwagon's testimony on September 14, 1976, established him as an expert in the field of market analysis and projection, first for Mead, and later for Crown. R.Tr. 103-130. Therefore, the District Court's refusal to let Stillwagon testify as an expert witness regarding RWC's damage calculations was reversible error and the Ninth Circuit's affirmation of this action compounded this error.

XI

CONCLUSION

For the above-stated reasons, Petitioner respectfully requests this

Court to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and remand this case for a new trial based on proper jury instructions.

DATED: July 15, 1979

FRANCIS O. SCARPULLA
Attorney for Petitioner

JAMES M. GARLOCK
DAVID A. SHERMAN
Of Counsel

(Appendices A, B and C Follow)

Appendices

[¶ 62,544] **Reno-West Coast Distribution Co., Inc., Plaintiff-Appellant v. The Mead Corp., Blake, Moffitt & Towne, a Division of Saxon Industries, Inc., Nolex Inc., Noland Paper Co. and Seaboard Paper Co., Defendants-Appellees; Reno-West Coast Distribution Co., Inc., Plaintiff v. The Mead Corp., Blake, Moffitt & Towne, etc., et al., Defendants; The Mead Corp., Claimant-Appellee v. Reno-West Coast Distribution Co., Inc., Matrix Inc., George B. Stillwagon III, Counterclaimants-Appellants.**

U. S. Court of Appeals, Ninth Circuit. Nos. 77-1029 and 77-1073. Dated February 21, 1979. Appeal from U. S. District Court, Northern District of California.

Before: MOORE,* SNEED and KENNEDY, Circuit Judges.

[Opinion]

SNEED, Cir. J.: Plaintiff Reno-West Coast Distribution Co. (RWC) appeals from a judgment entered for defendants after a jury trial in its action alleging a conspiracy to impose territorial and price restrictions violative of Section 1 of the Sherman Act. Three issues are presented on appeal; the first two pertain to the adequacy of the district judge's jury instructions while the third concerns the propriety of the court's exclusion of certain testimony on damages offered by RWC. This court has jurisdiction pursuant to 28 U. S. C. § 1291. We affirm.

I.

Facts

Plaintiff-appellant RWC, an independent paper merchant house located in Reno, Nevada, was engaged in the wholesale distribution of business and commercial papers primarily manufactured by defendant Mead Corporation. Mead manufactures various paper products which it markets through Mead-owned wholesale paper merchant houses and independent wholesale merchant houses, or sells directly to certain large customers. Defendant Noland Paper Company is a Los Angeles-based wholesale paper merchant house which was partially-owned by Mead until 1972. Defendant Seaboard Paper Company is a San Francisco-based, partially-owned subsidiary of Mead.

Plaintiffs and defendants presented dramatically different versions of the facts to the jury. RWC charged that Mead conspired with the other defendants to restrict the resale territory and prices of the plaintiff. Specifically, RWC argued that Mead imposed territorial and price restrictions as a condition of granting RWC a distributorship; that RWC engaged in aggressive price cutting outside its prescribed territory and as a consequence, began to increase its market share at the expense of various competitors, including defendants Noland and Seaboard; that Mead acted on complaints from various distributors and conspired with its subsidiaries, Seaboard and Noland, to terminate RWC's business; and that Mead effected the unlawful scheme to end RWC's business by drastically reducing the credit available to RWC. Defendants countered by arguing that any territorial or price restrictions followed by RWC had been suggested by its own President and later were abandoned with Mead's implicit approval; that RWC did not act as an independent distributor, but served merely as a Mead broker or agent; that Mead did not terminate RWC, but merely limited its credit due to RWC's inability to make timely payment of its obligations to Mead; and that RWC was, from its inception, a small thinly capitalized company that never had a profitable year. At the conclusion of a month-long trial the jury returned a verdict in favor of defendants.

II.

Adequacy of the Jury Instructions

The trial judge refused to charge the jury in accordance with appellant's proposed instruction concerning antitrust liability.[1] Appellant now voices two complaints con-

* Hon. Leonard P. Moore, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

[1] RWC proposed the following instruction concerning antitrust liability:

"The antitrust laws are intended to foster and preserve our system of free, competitive enterprises, to preserve the fullest practicable competition in the market place, and to prevent the accomplishment of a monopoly in any business or industry.

"There are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are

cerning the instructions given. First, RWC complains that the trial court erred by refusing to give the *Schwinn* per se illegality charge concerning territorial restrictions which it offered. Second, RWC complains that the trial court erred by allegedly refusing to give the *General Motors* per se illegality charge concerning a horizontal conspiracy among the various distributors which it requested. We will consider each of these contentions in order.

The district court's refusal to give plaintiff's proffered *Schwinn* instruction concerning alleged territorial restraints was proper in light of the prevailing precedent in this circuit at the time of trial and its propriety subsequently has been fully vindicated by the Supreme Court's decision in *Continental T. V., Inc. v. GTE Sylvania, Inc.* [1977-1 TRADE CASES ¶ 61,488], 433 U. S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977). The rule of reason instruction given by the district court comports with the standard set forth in *GTE Sylvania*. No error exists in this sector.

Appellant's second complaint is that the trial court erroneously refused to instruct the jury on its theory that a horizontal conspiracy existed among its competitors, in which Mead served as the enforcer. The trial court properly refused to give plaintiff's requested horizontal conspiracy charge because it was comingled with the improper *Schwinn* per se instruction. The *GTE Sylvania* decision largely undercut the primary theory of recovery advanced by plaintiff below, *i. e.*, that defendant Mead, acting alone or in concert with the other defendants, conspired to impose vertical territorial and price restrictions on RWC. Faced with this subsequent, unfavorable precedent, appellant now seeks to resurrect its horizontal conspiracy contentions. The charge proffered by appellant, however, did not clearly and unambiguously state the law dealing with a *General Motors*-type horizontal conspiracy. See *United States v. General Motors Corp.* [1966 TRADE CASES ¶ 71,750], 384 U. S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966); *Bowen v. New York News, Inc.* [1975-2 TRADE CASES ¶ 60,415], 522 F. 2d 1242 (2d Cir. 1975), cert. denied, 425 U. S. 936, 96 S. Ct. 1667, 48 L. Ed. 2d 177 (1976); *Eiberger v. Sony Corp.* [1978-2 TRADE CASES ¶ 62,336], 459 F. Supp. 1276 (S. D. N. Y. 1978). A literal reading of the proposed instruction suggests that it was intended to encompass only a vertical conspiracy involving defendant Mead, acting either alone or in concert with the other defendants.[2] We are of the opinion

conclusively deemed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they caused or the business excuse for their use. Territorial restrictions are [sic] resale price fixing are in this category.

"A territorial restriction exists where a manufacturer sells its goods to a distributor and then restricts the area in which that distributor can resell those products. This, without more, is a violation of the antitrust laws. Such an agreement is illegal whether done only by the manufacturer or whether the manufacturer worked in concert with other distributors.

"Resale price fixing occurs when a seller requires the person to whom he has sold goods to resell them at a specified price. Territorial restrictions occur when the seller of goods limits or restricts the area in which the person to whom he sold the merchandise can resell the merchandise. Customer restrictions occur when a manufacturer prohibits its distributor from reselling products to certain customers.

"If you find such violations here, I instruct you that the fact that the defendants or the co-conspirators may have had some business justification for their conduct would not constitute a defense. Nor is it a defense in such circumstances that the defendants may have believed that what they were doing was legal or good for business.

"Accordingly, should you find from the evidence in this case that the Mead Business & Commercial papers sold to plaintiff, to the other defendants or co-conspirators, or all of them, moved in the course of interstate commerce, and should you further find that the defendant Mead, either alone or in concert with any of the other defendants or co-conspirators, restricted the area in which plaintiff could re-sell B&C papers, or the customers to whom plaintiff could re-sell B&C papers, or that resale prices were maintained, then the defendants would have violated the antitrust laws in the manner charged by the plaintiff, and you must find for the plaintiff."

[2] Note the following passages taken from the proposed instruction:

"A territorial restriction exists *where a manufacturer sells* its goods *to a distributor and* then *restricts* the area in which *that distributor* can resell those products. This, without more, is a violation of the antitrust laws. Such an agreement is illegal *whether done only by the manufacturer or whether the manufacturer worked in concert with other distributors.*

"Resale price fixing occurs *when a seller requires the person to whom he has sold* goods to resell them at a specified price. Territorial restrictions occur *when the seller of goods limits or restricts the area in which the person to whom he sold* the merchandise can resell the merchandise. Customer restrictions occur *when a manufacturer prohibits its distributor* from reselling products to certain customers.

• • •

"Accordingly, . . . should you . . . find that *the defendant Mead, either alone or in concert with any of the other defendants* or co-conspirators, restricted the area in which plaintiff could re-sell B&C papers, or the customers to whom plaintiff could re-sell B&C papers, or that resale prices were maintained then the defendants would have violated the antitrust laws in the manner charged by the plaintiff, and you must find for the plaintiff" (emphasis added).

that the proffered charge concerning a *General Motors* conspiracy was not properly presented to the trial court and that plaintiff's horizontal conspiracy theory was, in any event, adequately covered by the trial court's instructions taken as a whole. *Gray v. Shell Oil Co.* [1972 TRADE CASES ¶ 74,247], 469 F. 2d 742, 747-48 (9th Cir. 1972), cert. denied, 412 U. S. 943, 93 S. Ct. 2773, 37 L. Ed. 2d 403 (1973).[3]

Although it is true that a party is entitled to have its theory of the case presented to the jury by proper instructions, "the word 'proper' deserves emphasis. The burden is upon counsel to present a [proper] instruction. If what he proposes is incorrect, the court may reject it; the court is not required to recast it, although it may do so." *Blassingill v. Waterman S. S. Corp.*, 336 F. 2d 367, 368 n. 2 (9th Cir. 1964). In this case the trial court adequately instructed the jury concerning the applicable law. While the charge might have been fashioned so that it expounded plaintiff's theory more clearly, it does not follow that it was uncertain or inadequate under the circumstances. See *Osguthorpe v. Anschutz Land & Livestock Co.*, 456 F. 2d 996, 1004 (10th Cir. 1972).

III.

Exclusion of Testimony Concerning Damages

Appellant's final contention is that the district court erred by refusing to permit RWC's President, George Stillwagon, to testify as an expert witness concerning the

[3] Note, e. g., the following excerpts from the instructions given by the trial court:

"In this action the plaintiff complains that in December of 1970, the defendant, Mead, along with defendants Seaboard and/or Noland and other co-conspirators, combined and conspired in violation of the antitrust laws to restrain interstate trade and commerce in the sale of business and commercial papers.

"Plaintiff contends that Defendant Mead acted in concert with the other defendants to restrict the territory in which plaintiff could resell Mead's business and commercial papers.

"Plaintiff also contends that Defendant Mead, in concert with Defendant Seaboard and others, required Plaintiff to maintain resale prices for business and commercial papers.

"Plaintiff further contends that defendant Mead, to protect Seaboard and Noland, effectively terminated plaintiff as a Mead merchant house."

• • •

"You will note that not every act in restraint of trade is illegal under the Sherman Act, but only when it is a result of a combination, contract, or conspiracy. These words mean practically the same thing and it is a necessary element in the plaintiff's case that for you to find there was a combination or conspiracy—the words are practically interchangeable—to restrain trade in the fine papers business.

"There can be no conspiracy unless more than one person is involved. The very word "conspiracy" means "together with someone else."

• • •

"The first thing that is required before you have a conspiracy is that there be two or more parties to the alleged conspiracy. This means that at least one defendant must be found to have agreed with one or more others to carry out the illegal acts which plaintiff claims they carried out. . . . [T]he law requires that any conspiracy you find in this case must be between a defendant and one or more other persons including, of course, the other defendants.

. . .

"The plaintiff claims that the conspiracy occurred among Mead, Seaboard, and Noland, the defendants in this action. You cannot find defendants liable for a conspiracy to unreasonably restrain trade unless you find that one or more of these companies participated in such a conspiracy.

"As I said a moment ago, a conspiracy requires at least two independent parties and a defendant cannot be found guilty of conspiring with itself.

"A conspiracy is a combination or agreement of two or more persons to accomplish some unlawful purpose or to accomplish some lawful purpose for unlawful means. So a conspiracy is a kind of partnership in which each member becomes the agent of every other member.

"The essence of a conspiracy is a combination or agreement to violate the law."

• • •

"Before you can find that Mead, Noland or Seaboard became a member of the conspiracy complained of by plaintiffs, you must find by a preponderance of the evidence first, that the conspiracy was knowingly formed; and second, at least two defendants knowingly participated in a common and unlawful plan with the intent to materially aid or further some object or purpose of the plan."

• • •

"In determining whether and to what extent there was a conspiracy between the defendants and any of the co-conspirators, you may take into consideration the fact that such a conspiracy can be achieved by agreement, by tacit understanding between the defendants and co-conspirators or by acquiescence coupled with assistance in bringing about its purposes."

• • •

"Reno-West Coast also claims that it was terminated as a fine paper's dealer in furtherance of a price-fixing conspiracy involving the defendants. In order to establish this claim plaintiff must show, by a preponderance of the evidence, (1) that Mead and these merchants actually agreed to fix fine paper prices in the west coast area, and (2) that Mead terminated Reno-West Coast as a fine paper's dealer in furtherance of the conspiracy.

"A conspiracy to fix prices in or effecting interstate commerce, such as alleged in the complaint, is in and of itself an unreasonable restraint of trade.

"Whether the prices agreed to be fixed were or are reasonable or unreasonable is immaterial, but the conspiracy to fix prices in interstate commerce is of itself an unreasonable restraint of trade."

method used to calculate plaintiff's projected damages. The court permitted Stillwagon to testify to the following issues: the percentage market share possessed by plaintiff in Nevada; the percentage market share plaintiff claimed it could have captured in the areas of alleged exclusion; and the estimated gross receipts and net profits from anticipated sales in the restricted areas. The trial court also permitted one of plaintiff's witnesses, a Dr. Haessler, to testify as an expert concerning the information plaintiff sought to introduce through Stillwagon. Appellant's reliance upon *Pacific Coast Agricultural Export Assn. v. Sunkist Growers, Inc* [1975-2 TRADE CASES ¶ 60,617], 526 F. 2d 1196 (9th Cir. 1975), cert. denied, 425 U. S. 959, 96 S. Ct. 1741, 48 L. Ed. 2d 204 (1976) is misplaced. In *Sunkist* the district court found that plaintiff's expert witnesses were properly qualified as experienced businessmen capable of providing the information sought. In this case the district court concluded that Mr. Stillwagon was not so qualified. The trial court is vested with broad discretion concerning the admissibility or exclusion of expert testimony and the court's action is to be sustained unless shown to be manifestly erroneous. *Hamling v. United States*, 418 U. S. 87, 108, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); *Salem v. United States Lines Co.*, 370 U. S. 31, 35, 82 S. Ct. 1119, 8 L. Ed. 2d 313 (1962); *United States v. Navarro-Varelas*, 541 F. 2d 1331 (9th Cir. 1976), cert. denied, 429 U. S. 1045, 97 S. Ct. 751, 50 L. Ed. 2d 759 (1977). No such showing has been made in this case.

Accordingly, we affirm the judgment of the district court.

Affirmed.

RECEIVED
MAY 12 1979

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 11 1979
EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

RENO-WEST COAST DISTRIBUTION CO., INC., Plaintiff-Appellant, vs. THE MEAD CORPORATION, BLAKE, MOFFITT & TOWNE, a division of SAXON INDUSTRIES, INC., NOLEX, INC., NOLAND PAPER COMPANY and SEABOARD PAPER COMPANY, Defendants-Appellees.	NOS. 77-1029 77-1076
THE MEAD CORPORATION, Claimant-Appellant, vs. RENO-WEST COAST DISTRIBUTION CO., INC., MATRIX INC., and GEORGE B. STILLWAGON, III, Counterdefendants-Appellees.	ORDER

Before: MOORE,* SNEED and KENNEDY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Sneed and Kennedy have voted to reject the suggestion for a rehearing in banc, and Judge Moore has recommended rejection of the suggestion for rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

*Hon. Leonard P. Moore, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

APPENDIX B

UNITED STATES CONSTITUTIONAL LAW

(Article V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SECTION 1 -- SHERMAN ACT

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

APPENDIX C

EXHIBITS 1 - 4

October 14, 1970

CONFIDENTIAL

TO: Mr. L. E. Pedersen

FROM: R. L. Ordeman

SUBJECT: Merchant Proposal -- George Stillwagon

George Stillwagon is considering the possibility of establishing a Merchant House in Reno, Nevada. The proposal itself is attached and I would appreciate your reviewing it carefully and discussing it with me as soon as possible.

George fully appreciates the possible conflicts and is quite willing to start in areas where there will not be conflicts. Assuming he performs well and is out-performing regular merchants, we would then have the opportunity to extend his franchise into other areas. Quite obviously, there is much to be considered. In the meantime, I think it should be kept strictly confidential.

R. L. Ordeman
de

attachment

cc: Messrs. J. W. Herbert
G. B. Stillwagon

NOC-73-0250-SW
Exhibit No. 11
Filed
William L. Whittaker, Clerk
By
Deputy Clerk
Exhibit 1

EXHIBIT
WITNESS
HENRY A. CLINTON, C.S.R.

101360

MEAD PAPERS 6055 EAST WASHINGTON BLVD., LOS ANGELES, CALIF. 90022

November 6, 1970

TO: MR. R. L. ORDEMAN

FR: L. E. PEDERSEN

I had a meeting with George Stillwagon yesterday concerning the proposal for a merchant house in Reno. I am a little in the dark as to how he intends to buy this paper and sell it, but these details can be worked out later. As far as territory is concerned, I feel that if we go ahead with this that they should concentrate in the Reno area, including Sparks, Carson City, Las Vegas, and possibly the Valley, which would take in Modesto, Fresno, and as far South as Bakersfield..

This is pretty well covered by the Zellerbach and Blake houses, but I do not believe that either of our San Francisco distributors are doing very much in these markets.

L. E. Pedersen

LEP/ng
cc: J. Herbert

NO. C-73-0258-SW
P Exhibit No. 13
Filed
William L. Whittaker, Clerk
By
Deputy Clerk

EXHIBIT 18
WITNESS

Exhibit 2

NO. C-73-0258-SW
P Exhibit No. 17
Filed
William L. Whittaker, Clerk
By
Deputy Clerk

Exhibit 3

DEC 14 1970

1022:0

MEAD PAPERS 6055 EAST WASHINGTON BLVD., LOS ANGELES, CALIF. 90022

December 10, 1970

TO: MR. R. L. ORDEMAN

FR: L. E. PEDERSEN

You asked me to fill in a map covering area involved for George Stillwagon. Actually, the counties this covers is a vast area and I am inclined to believe that we should not offer all of this area "carte blanche" to George.

Operating out of Reno he will be covering many of these counties, particularly cities such as Bakersfield, Fresno, Reno, etc., and some of this takes him pretty far South. He has no objections to other distributors coming into the market but I believe it best to consider whatever possibility we get into with him as a Reno distributor. He will be operating primarily in Reno with some coverage of the surrounding territory.

As I mentioned to Dottie, Al Lindenbaum and I did have lunch with George on Monday and I feel that Al has no serious objections, providing (1) that he stays out of Sacramento, and (2) that he sticks to regular pricing and cash discount terms.

George has more or less agreed to these, and under the circumstances, I can really have no serious objection to this operation in Reno.

L. E. Pedersen

L. E. PEDERSEN

LEP/ng
cc: J. Herbert

NO. C-73-0250-SW
P Exhibit No. 16
Filed
William L. Whittaker, Clerk
By
Deputy Clerk

DATE EXHIBIT 6-2-75 WITNESS THOMAS A. LEATHOCK CLERK

Exhibit 4

Supreme Court, U. S.
FILED
AUG 7 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

NO. 79-217

RENO-WEST COAST DISTRIBUTION CO., INC.,

Petitioner,

v.

THE MEAD CORPORATION, BLAKE MOFFITT & TOWNE, a division of Saxon Industries, Inc., NOLEX, INC., NOLAND PAPER COMPANY and SEABOARD PAPER COMPANY

Respondents.

APPENDICES TO

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANCIS O. SCARPULLA
JAMES M. GARLOCK
DAVID A. SHERMAN
SCARPULLA & GARLOCK
300 Montgomery Street
Suite 600
San Francisco, CA 94104
(415) 788-7210
Attorneys for Petitioner

[¶62,544] Reno-West Coast Distribution Co., Inc., Plaintiff-Appellant v. The Mead Corp., Blake, Moffitt & Towne, a Division of Saxon Industries, Inc., Nolex Inc., Noland Paper Co. and Seaboard Paper Co., Defendants-Appellees; Reno-West Coast Distribution Co., Inc., Plaintiff v. The Mead Corp., Blake, Moffitt & Towne, etc., et al., Defendants; The Mead Corp., Claimant-Appellee v. Reno-West Coast Distribution Co., Inc., Matrix Inc., George B. Stillwagon III, Counterclaimants-Appellants.

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* All footnotes follow at the end of text.

APPENDIX A

certain testimony on damages offered by RWC. This court has jurisdiction pursuant to 28 U. S. C. §1291. We affirm.

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distributors and conspired with its subsidiaries, Seaboard and Noland, to terminate RWC's business; and that Mead effected the unlawful scheme to end RWC's business by drastically reducing the credit available to RWC. Defendants countered by arguing that any territorial or price restrictions followed by RWC had been suggested by its own President and later were abandoned with Mead's implicit approval; that RWC did not act as an independent distributor, but served merely as a Mead broker or agent; that Mead did not terminate RWC, but merely limited its credit due to RWC's inability to make timely payment of its obligations to Mead; and that RWC was, from its inception, a small thinly capitalized company that never had a profitable year. At the conclusion of a month-long trial the jury returned a verdict in favor of defendants.

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Appellant's second complaint is that the trial court erroneously refused to instruct the jury on its theory that a horizontal conspiracy existed among its competitors, in which Mead served as the enforcer. The trial court properly refused to give plaintiff's requested horizontal conspiracy charge because it was comingled with the improper Schwinn per se instruction. The GTE Sylvania decision largely undercut the primary theory of recovery advanced by plaintiff below, i.e., that defendant Mead, acting alone or in concert with the other defendants, conspired to impose vertical territorial and price restrictions on RWC. Faced with this subsequent, unfavorable precedent, appellant now seeks to resurrect its horzontal conspiracy contentions. The charge proffered by appellant, however, did not clearly and unambiguously state the law dealing with a General Motors-type horizontal conspiracy. See United States v. General Motors Corp. [1966 Trade Cases ¶71,750], 384 U.S. 127,

86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); Bowen v. New York News, Inc. [1975-2 Trade Cases ¶60,415], 522 F.2d 1242 (2d Cir. 1975), cert. denied, 425 U.S. 936, 96 S.Ct. 1667, 48 L.Ed.2d 177 (1976); Eiberger v. Sony Corp. [1978-2 Trade Cases ¶62,336], 459 F.Supp. 1276 (S.D.N.Y. 1978). A literal reading of the proposed instruction suggests that it was intended to encompass only a vertical conspiracy involving defendant Mead, acting either alone or in concert with the other defendants.2 We are of the opinion that the proffered charge concerning a General Motors conspiracy was not properly presented to the trial court and that plaintiff's horizontal conspiracy theory was, in any event, adequately covered by the trial court's instructions taken as a whole. Gray v. Shell Oil Co. [1972 Trade Cases ¶74,247], 469 F.2d 742, 747-48 (9th Cir. 1972), cert. denied, 412 U.S. 943, 93 S.Ct. 2773, 37 L.Ed.2d 403 (1973).3

Although it is true that a party is entitled to have its theory of the case presented to the jury by proper instructions, "the word 'proper' deserves emphasis. The burden is upon counsel to present a [proper] instruction. If what he proposes is incorrect, the court may reject it; the court is not required to recast it, although it may do so." Blassingill v. Waterman S.S. Corp., 336 F.2d 367, 368 n.2 (9th Cir. 1964). In this case the trial court adequately instructed the jury concerning the applicable law. While the charge might have been fashioned so that it expounded plaintiff's theory more clearly, it does not follow that it was uncertain or inadequate under the circumstances. See Osguthorpe v. Anschutz Land & Livestock

Co., 456 F.2d 996, 1004 (10th Cir. 1972).

III.

Exclusion of Testimony Concerning Damages

Appellant's final contention is that the district court erred by refusing to permit RWC's President, George Stillwagon to testify as an expert witness concerning the method used to calculate plaintiff's projected damages. The court permitted Stillwagon to testify to the following issues: the percentage market share possessed by plaintiff in Nevada; the percentage market share plaintiff claimed it could have captured in the areas of alleged exclusion; and the estimated gross receipts and net profits from anticipated sales in the restricted areas. The trial court also permitted one of plaintiff's witnesses, a Dr. Haessler, to testify as an expert concerning the information plaintiff sought to introduce through Stillwagon. Appellant's reliance upon Pacific Coast Agricultural Export Assn. v. Sunkist Growers, Inc. [1975-2 Trade Cases ¶60,617], 526 F.2d 1196 (9th Cir. 1975), cert. denied, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976) is misplaced. In Sunkist the district court found that plaintiff's expert witnesses were properly qualified as experienced businessmen capable of providing the information sought. In this case the district court concluded that Mr. Stillwagon was not so qualified. The trial court is vested with broad discretion concerning the admissibility or exclusion of expert testimony and the court's action is to be sustained unless shown to be manifestly erroneous. Hamling v.

United States, 418 U.S. 87, 108, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); Salem v. United States Lines Co., 370 U.S. 31, 35, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962); United States v. Navarro-Varelas, 551 F.2d 1331 (9th Cir. 1976), cert. denied, 429 U.S. 1045, 97 S.Ct. 751, 50 L.Ed.2d 759 (1977). No such showing has been made in this case.

Accordingly, we affirm the judgment of the district court.

Affirmed.

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* Hon. Leonard P. Moore, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

1 RWC proposed the following instruction concerning antitrust liability:

"The antitrust laws are intended to foster and preserve our system of free, competitive enterprises, to preserve the fullest practicable competition in the market place, and to prevent the accomplishment of a monopoly in any business or industry.

"There are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively deemed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they caused or the business excuse for their use. Territorial restrictions

are [sic] resale price fixing are in this category.

"A territorial restriction exists where a manufacturer sells its goods to a distributor and then restricts the area in which that distributor can resell those products. This, without more, is a violation of the antitrust laws. Such an agreement is illegal whether done only by the manufacturer or whether the manufacturer worked in concert with other distributors.

"Resale price fixing occurs when a seller requires the person to whom he has sold goods to resell them at a specified price. Territorial restrictions occur when the seller of goods limits or restricts the area in which the person to whom he sold the merchandise can resell the merchandise. Customer restrictions occur when a manufacturer prohibits its distributor from reselling products to certain customers.

"If you find such violations here, I instruct you that the fact that the defendants or the co-conspirators may have had some business justification for their conduct would not constitute a defense. Nor is it a defense in such circumstances that the defendants may have believed that what they were doing was legal or good for business.

"Accordingly, should you find from the evidence in this case that the Mead Business & Commercial papers sold to plaintiff, to the other defendants or co-conspirators, or all of them, moved in the course of interstate commerce, and should you further find that the defendant Mead,

either alone or in concert with any of the other defendants or co-conspirators, restricted the area in which plaintiff could re-sell B&C papers, or the customers to whom plaintiff could re-sell B&C papers, or that resale prices were maintained, then the defendants would have violated the antitrust laws in the manner charged by the plaintiff, and you must find for the plaintiff."

2 Note the following passages taken from the proposed instruction:

"A territorial restriction exists where a manufacturer sells its good to a distributor and then restricts the area in which that distributor can resell those products. This, without more, is a violation of the antitrust laws. Such an agreement is illegal whether done only by the manufacturer or whether the manufacturer worked in concert with other distributors.

"Resale price fixing occurs when a seller requires the person to whom he has sold goods to resell them at a specfied when the seller of goods limits or restricts the area in which the person to whom he sold the merchandise can resell the merchandise. Customer restrictions occur when a manufacturer prohibits its distributor from reselling products to certain customers.

* * *

"Accordingly, . . . should you . . . find that the defendant Mead, either alone or in concert with any of the other defendants or co-conspirators, restricted

the area in which plaintiff could re-sell B&C papers, or the customers to whom plaintiff could re-sell B&C papers, or that resale prices were maintained then the defendants would have violated the antitrust laws in the manner charged by the plaintiff, and you must find for the plaintiff" (emphasis added).

3 Note, e.g., the following excerpts from the instructions given by the trial court:

"In this action the plaintiff complains that in December of 1970, the defendant, Mead, along with defendants Seaboard and/or Noland and other co-conspirators, combined and conspired in violation of the antitrust laws to restrain interstate trade and commerce in the sale of business and commercial papers.

"Plaintiff contends that Defendant Mead acted in concert with the other defendants to restrict the territory in which plaintiff could resell Mead's business and commercial papers.

"Plaintiff also contends that Defendant, Mead, in concert with Defendant Seaboard and others, required Plaintiff to maintain resale prices for business and commercial papers.

"Plaintiff further contends that defendant Mead, to protect Seaboard and Noland, effectively terminated plaintiff as a Mead merchant house."

* * *

"You will note that not every act in restraint of trade is illegal under the Sherman Act, but only when it is a result of a combination, contract, or conspiracy. These words mean practically the same thing and it is a necessary element in the plaintiff's case that for you to find there was a combination or conspiracy -- the words are practically interchangeable -- to restrain trade in the fine papers business.

"There can be no conspiracy unless more than one person is involved. The very word "conspiracy" means "together with someone else."

* * *

"The first thing that is required before you have a conspiracy is that there be two or more parties to the alleged conspiracy. This means that at least one defendant must be found to have agreed with one or more others to carry out the illegal acts which plaintiff claims they carried out. . . . [T]he law requires that any conspiracy you find in this case must be between a defendant and one or more other persons including, of course, the other defendants. . . .

"The plaintiff claims that the conspiracy occurred among Mead, Seaboard, and Noland, the defendants in this action. You cannot find defendants liable for a conspiracy to unreasonably restrain trade unless you find that one or more of these companies participated in such a conspiracy.

"As I said a moment ago, a conspiracy requires at least two independent parties

and a defendant cannot be found guilty of conspiring with itself.

"A conspiracy is a combination or agreement of two or more persons to accomplish some unlawful purpose or to accomplish some lawful purpose for unlawful means. So a conspiracy is a kind of partnership in which each member becomes the agent of every other member.

"The essence of a conspiracy is a combination or agreement to violate the law."

* * *

"Before you can find that Mead, Noland or Seaboard became a member of the conspiracy complained of by plaintiffs, you must find by a preponderance of the evidence first, that the conspiracy was knowingly formed; and second, at least two defendants knowingly participated in a common and unlawful plan with the intent to materially aid or further some object or purpose of the plan."

* * *

"In determining whether and to what extent there was a conspiracy between the defendants and any of the co-conspirators, you may take into consideration the fact that such a conspiracy can be achieved by agreement, by tacit understanding between the defendants and co-conspirators or by acquiescense coupled with assistance in bringing about its purposes."

* * *

"Reno-West Coast also claims that it was terminated as a fine paper's dealer in furtherance of a price-fixing conspiracy involving the defendants. In order to establish this claim plaintiff must show, by a preponderance of the evidence, (1) that Mead and these merchants actually agreed to fix fine paper prices in the west coast area, and (2) that Mead terminated Reno-West Coast as a fine paper's dealer in furtherance of the conspiracy.

"A conspiracy to fix prices in or effecting interstate commerce, such as alleged in the complaint, is in and of itself an unreasonable restraint of trade.

"Whether the prices agreed to be fixed were or are reasonable or unreasonable is immaterial, but the conspiracy to fix prices in interstate commerce is of itself an unreasonable restraint of trade."

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 11 1979
EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

RENO-WEST COAST DISTRIBUTION CO., INC.,	)	
Plaintiff-Appellant,	)	
v.	)	
THE MEAD CORPORATION, BLAKE, MOFFITT & TOWNE, a division of SAXON INDUSTRIES, INC., NOLEX, INC., NOLAND PAPER COMPANY and SEABOARD PAPER COMPANY,	)	NOS. 77-1029 77-1076
Defendants-Appellees.	)	ORDER
THE MEAD CORPORATION,	)	
Claimant-Appellant,	)	
vs.	)	
RENO-WEST COAST DISTRIBUTION CO., INC., MATRIX, INC., and GEORGE B. STILLWAGON, III,	)	
Counterdefendants-Appellees.	)	

Before: MOORE,* SNEED and KENNEDY, Circuit Judges.

---

* Hon. Leonard P. Moore, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Sneed and Kennedy have voted to reject the suggestion for a rehearing in banc, and Judge Moore has recommended rejection of the suggestion for rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

UNITED STATES CONSTITUTIONAL LAW

(Article V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SECTION 1 -- SHERMAN ACT

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Supreme Court, U. S.
FILED
SEP 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-217

RENO-WEST COAST DISTRIBUTING CO., INC.,
Petitioner,

v.

THE MEAD CORPORATION, BLAKE, MOFFIT & TOWNE, a division of SAXON INDUSTRIES, INC., NOLEX, INC., NOLAND PAPER COMPANY and SEABOARD PAPER COMPANY,
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

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OCTOBER TERM, 1979

No. 79-217

RENO-WEST COAST DISTRIBUTING CO., INC.,

Petitioner,

v.

THE MEAD CORPORATION, BLAKE, MOFFIT & TOWNE, a division of SAXON INDUSTRIES, INC., NOLEX, INC., NOLAND PAPER COMPANY and SEABOARD PAPER COMPANY,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

QUESTIONS PRESENTED

Petitioner's statement of the questions presented[1] is misleading and frames issues not presented in their present form to the courts below. The following questions are presented to this Court, each of which this Court has answered in various prior decisions. The questions presented below are in the same order as those set forth in the four questions presented at p. 4-5 of the Petition.

1. Did the District Court err in refusing to give the *Schwinn*[2] per se instruction (Plaintiff's Proposed Instruc-

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[1] Petition at pp. 4-5.

[2] *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

tion No. 5) requested by Petitioner, which was the only per se jury instruction Petitioner sought at trial?

This question was answered in the negative in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) ("*GTE Sylvania*").

2. Did the District Court err in refusing to give Plaintiff's Proposed Instruction No. 5, as that proposed jury charge purports to follow *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966)?

This question was answered in the negative in *GTE Sylvania, United States* v. *General Motors Corp.*, and *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972).

3. Did the District Court err in following the Ninth Circuit's previous opinion in its en banc consideration of *GTE Sylvania* which en banc opinion of the Ninth Circuit was later affirmed by this Court in *GTE Sylvania,* when (1) the Ninth Circuit's en banc opinion was decided April 9, 1976, and (2) when this case was tried in September and October, 1976?

This question was answered in the negative by this Court in *GTE Sylvania,* and by this Court's repeated holdings that a court (in this case the Ninth Circuit) should apply the law in effect at the time it renders its decision, *Bradley* v. *School Board of City of Richmond,* 416 U.S. 696, 711 (1974); and *Cort* v. *Ash,* 422 U.S. 66, 76-77 (1975).

4. Did the District Court err in refusing to allow Petitioner's president to testify *as an expert* concerning Petitioner's alleged damages, in view of the fact that the District Court (1) permitted Petitioner's president to testify as a layman both as to the theory and numbers involved in the alleged damages, and (2) permitted a Ph.D. from the University of Michigan to testify as an expert concerning both the theory and numbers involved in the alleged damages?

This question was answered in the negative in *Hamling* v. *United States,* 418 U.S. 87, 108 (1974); and in *Salem* v. *United States Lines Co.,* 370 U.S. 31, 35 (1962).

REASONS FOR DENYING THE WRIT

Respondents agree with Petitioner's statement that there are "stringent rules" for determination of the grant of petitions for certiorari.[3] The instant Petition must fail because no novel or significant questions are presented for review. There are at least four separate reasons for denying this Petition, each of which is sufficient:

(1) There is no "extension of this Court's *GTE-Sylvania* rule of reasons [sic] test to vertical price restraints"[4] as claimed by Petitioner. Contrary to Petitioner's claims,[5] the trial court gave a classic per se price-fixing instruction, and did not limit the instruction to horizontal price-fixing.[6] The rule of reason instruction given by the trial court[7] adequately covered the vertical territorial restrictions alleged by Petitioner.

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[3] Petition at p. 5.

[4] Petition at p. 6.

[5] At pp. 4, 6, 7, 32, 34, and 38-38 of the Petition.

[6] This price-fixing instruction is quoted in n. 3 of the Ninth Circuit opinion in this case; see the last three paragraphs of the jury instructions quoted in n. 3 of the Ninth Circuit opinion, which certainly show that the price-fixing instruction given was a per se instruction, and was not limited to either horizontal or vertical price-fixing. This price-fixing instruction is found in the record at C. Tr. 1072-73, and R. Tr. 2356-57.

[7] Found in the record at C. Tr. 1058.

(2) Petitioner complains to this Court of the refusal to give a per se jury instruction involving alleged vertical price-fixing[8] and an alleged horizontal combination,[9] when (1) Petitioner at trial asked for only one per se jury instruction, Plaintiff's Proposed Instruction No. 5,[10] and (2) Petitioner now misleadingly omits major portions of that jury instruction and redrafts that jury instruction on p. 38 of its Petition, so as to change the jury instruction and present to this Court a different jury instruction from that presented to the District Court. The drastic "cut and paste" job done to that proposed instruction is shown at pp. 16-19 of this Brief.

(3) Every element of Plaintiff's Proposed Instruction No. 5, the only per se jury instruction sought at trial, was adequately covered by the trial court in its instructions. See pp. 13-15, *infra*.

(4) With respect to Petitioner's claim of error in the trial court's refusal to give that part of Plaintiff's Proposed Instruction No. 5 that is supposedly based upon *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), it is significant that at trial Petitioner (1) told the District Judge that it was not relying on a horizontal price-fixing theory,[11] and (2) then agreed with the District Judge that Petitioner did not request any jury instruction on a horizontal conspiracy to restrict territory.[12]

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[8] Petition at pp. 6-8, 36-39, and 58.

[9] Petition at pp. 43-52.

[10] Found at C. Tr. 681 and quoted in full, without Petitioner's deletions, at pp. 13-15 of this Brief.

[11] C. Tr. 731 and 732, quoted at pp. 20-21, *infra*.

[12] This discussion with the trial Judge is found at R. Tr. 2377, quoted on p. 20, *infra*, and on p. 20 of the Brief of Appellees in the Ninth Circuit.

STATEMENT OF THE CASE

From the facts presented to this Court in Petitioner's brief it is difficult to understand how a jury, a federal district court judge and the Ninth Circuit Court of Appeals could come to a decision contrary to that urged by Petitioner.[13] The factual setting which Petitioner has presented to this Court is both inaccurate and incomplete. Petitioner's principal and president Mr. Stillwagon entered the business world and failed. Rather than examine his own actions in order to determine the reasons for his failure, he has sought throughout the six and one half year history of this case to shift any and all fault for his failure to The Mead Corporation.[14] The facts of this case neither support nor justify such a shift of responsibility.

Stillwagon is a former Mead employee whose employment was terminated in 1970. R.Tr. 1247. After receiving notice of his termination Stillwagon drafted and submitted a proposal (D-2) to Mead to become a merchant franchisee in Reno, Nevada. In this proposal Stillwagon unilaterally and without coercion or discussion with Mead proposed to limit sales efforts to parts of Nevada and California. Stillwagon asserted that his proposal was a novel approach to distribution in that he would sell directly from Mead's

---

[13] A jury verdict in favor of Respondents was affirmed by the Ninth Circuit Court of Appeals on February 21, 1979. When the jury returned its verdict in favor of all three Respondents in this action, the Court stated, R.Tr. 2388:

> "Well, ladies and gentlemen of the jury, you have been a very patient and hard working and perceptive jury, because I can say now at this time that *I concur in your verdict.*" (Emphasis added.)

[14] References to the record are as follows: Clerk's Transcript is C.Tr.; Reporter's Transcript is R.Tr.; Plaintiff's trial exhibit is P-000; Defendants' trial exhibit is D-000. Petitioner RenoWest Coast Distributing Company is abbreviated "RWC". Respondent the Mead Corporation is "Mead".

Western Regional Warehouse in Reno. He would thereby eliminate unnecessary distribution expenses such as those traditional costs incurred by independent distributors, *i.e.*, shipping, warehousing, capital expenditure for vehicles, inventory, and additionally, the risk of loss. Also to be eliminated were many of the traditional services provided to printer customers, thereby eliminating the necessity for personnel to provide those services. R.Tr. 410; D-2; R.Tr. 245-250; R.Tr. 421. He proposed a longer delivery time as a "trade-off' for the lower prices to the printers. See D-2. In fact, RWC maintained title to an average inventody during its 30 month life span of only $2,000 per month. D-102, D-103, D-104.

Mead provided support to Stillwagon in his investigation of the paper market in Nevada by financing a trip to California to meet with Mr. Pedersen, Mead's west coast representative, and Mr. Lindenbaum, President of Seaboard Paper Company, a merchant in San Francisco in which Mead held a 50% ownership.

During Stillwagon's meeting with Pedersen, Stillwagon alleged that a map of the west coast was reviewed to determine where he could sell. R.Tr. 235. The map at issue was, in fact, produced by RWC and contained the handwriting of Stillwagon alone, no one else. D-145; R.Tr. 237. Stillwagon's allegations with reference to the map were denied by Pedersen. R.Tr. 1022.

When Stillwagon returned from California he submitted a revised final proposal. The draft of that proposal states, in Stillwagon's own handwriting, that the only territorial problem which had previously existed, "Sacramento," had been resolved. D-112. The resolution of that problem was evident from the proposal itself which contained an attached list of cities where Stillwagon proposed to sell and listed, among others, Sacramento. D-145. See R.Tr. 1254.

Stillwagon's final proposal reiterated his intent to become a broker of Mead products and to capture sales through price cutting. Mead approved the proposal with only two qualifications: (1) RWC would have a credit limit of $10,-000 with a maximum limit of $20,000; and (2) RWC would provide Mead with monthly financial statements. D-5; R.Tr. 1443.

RWC was destined to fail from its inception. Two primary factors contributed to its ultimate failure: (1) RWC was severely undercapitalized; and (2) despite representations by Stillwagon to Mead that he would spend all of his time on the business affairs of RWC, he grossly neglected RWC by diverting substantial portions of his own time to the promotion of a new business venture.

The initial capitalization of RWC was $20,000. This sum was consumed within the first three months of RWC's existence by the salaries which Stillwagon paid to himself and his two employees. RWC's capital problems were compounded by the fact that the accounts which it was able to attract were extremely slow to pay, and Mead required Stillwagon to pay currently on paper sold out of the Mead warehouse inventory. See the testimony of Mr. Jones, Controller of Mead at R.Tr. 1464-1471; and D-18.

With its capital exhausted, numerous bad accounts outstanding, and an inability to attract new customers or to generate new sales, RWC was unable to cover its expenses. RWC sought additional credit from Mead. See D-107 and R.Tr. 486-487. Mead was unaware of RWC's severe financial problems, having been supplied with false and misleading financial statements. D-11; R.Tr. 1952. In reliance upon those financial statements Mead agreed to continue RWC's open account. RWC's problems continued to worsen. It continued to sell to slow paying accounts. It began to divert revenues to finance a computer

service corporation, Matrix, which had been originated by Stillwagon and the two former Mead employees who had aided him in the founding of RWC, Messrs. Haessler and Adkins. R.Tr. 1847, 1897-1898; D-26. RWC began to ignore the limitation which Mead had placed upon its open account by increasing that open account beyond the agreed $20,000 limit. See D-30.

As the open account of RWC continued to exceed the $20,000 limit, Mead became increasingly concerned about the likelihood of collecting that debt. Therefore, Mead requested and finally received an assignment of RWC's receivables. See D-20 and D-21. Mead then advised Stillwagon that it would sell to him on open account only for certain approved customers who had good credit histories. See D-24 and D-30. With these credit steps, RWC began to stablize. However, Stillwagon continued to neglect RWC. At this point Stillwagon was acting not only as RWC's chief executive officer, but also as its principal sales man and financial officer, aided only by a secretary, Ms. Crabtree. In June of 1972, Stillwagon abandoned RWC entirely and moved from RWC's headquarters in Reno to San Francisco where he devoted all of his time to the computer service business, Matrix. The operation of RWC was left in the hands of the secretary, Ms. Crabtree.

In December 1971, prior to Stillwagon's total abandonment of RWC a west coast paper distributor, Blake, Moffit and Towne, had sought to sell Mead products in the Reno area. Mead denied that request noting that Stillwagon needed more time to develop the Reno market. See third paragraph of second page of D-28; R.Tr. 1274. Several months after Stillwagon deserted RWC, Mead granted Blake, Moffit and Towne's request to sell certain Mead products in the Reno area. P-88.

Ignoring Mead's limitation of $20,000 on its open account, RWC gradually increased its indebtedness to Mead to $70,000. See D-95 In December of 1972, Mead discovered the facts that RWC (1) was paying expenses of Matrix Corporation, (2) was submitting to Mead false and misleading financial information, and (3) had achieved a negative net worth. Pursuant to the previously obtained assignment of receivables (D-25), Mead determined in February, 1973, to execute its rights. Mead wrote to RWC's customers demanding that they pay their obligations directly to Mead. D-46. Shortly thereafter, on February 15, 1973 RWC instituted this antitrust action.

Evidence presented at the trial of this action disclosed a much different picture of the financial condition of RWC than that which had been given to Mead through RWC's financial statements. Over the three year period of its existence RWC lost $13,979.83. R.Tr. 1846. With respect to payment to Mead, 46% of RWC's sales were sixty days late and 43% were over 120 days late. See D-95 and D-132. Although RWC attempted to factor its accounts, it was unable to do so. R.Tr. 1906. RWC overstated its income in the financial statements submitted to Mead by $23,409 for the year 1972. R.Tr. 1927. The financial statements submitted to Mead were inconsistent with RWC's federal income tax returns. See D-45 and D-98, D-99, D-100, and D-101.

RWC's one time financial officer, Adkins, testified in all seriousness that one may distort gross profits within the legal rules of accounting, R.Tr. 600:

> "This goes back to the purpose of presenting this data in this form. It is essentially to show that when you look at the financial statements of a corporation, it is a little bit like looking at a tight sweater. What you see is not always so."

Petitioner was unable to discredit the testimony of Respondents' two expert witnesses at trial. These were Mr. Gradsky, a C.P.A. who testified as to RWC's distorted financials, lack of financial stability and success, and speculative, unsupported damage assumptions and projections, R.Tr. 1842-1959; and Dr. Bucklin, head of the Ph.D. program in business at UCLA, a leading expert in marketing and the channels of distribution, who testified as to RWC's reliance upon Mead's Western Regional Warehouse which was closed by Mead in 1973 (R.Tr. 1677), as to the inability of RWC to achieve the projected sales upon which RWC's claimed damages were based, and as to the economic theory of distribution. Dr. Bucklin's direct testimony is R.Tr. 1658-1738. Mead's Western Regional Warehouse was closed in December, 1973, because of the superior economic feasibility of truck shipments direct to the west coast, and because of the low inventory turnover of the warehouse. See D-50 and the testimony of Mr. Foster, Mead's distribution manager, at R.Tr. 1594-1602. See also R.Tr. 998.

At trial RWC offered a damage exhibit (P-110) which purported to show a range of damages to RWC. The jury was not advised of any precise number of damages allegedly suffered but was invited by plaintiff to speculate that RWC had been damaged in amounts varying from $2,877,000 to $37,454,000. Such damages were computed by projecting a growth of sales and profits in Nevada (ignoring the actual performance of RWC which lost money over its period of operation) and then applying such projected growth to anticipated sales in California, Oregon, Utah, Arizona, Idaho and Washington. RWC never attempted sales in the latter four states. Such sales were projected for the period of the lifetime of George Stillwagon, who was assumed to retire at age 65. (Then, presumably because

of the inevitable economic fortunes of RWC, he would have become a multi-millionaire.) After this exhibit was thoroughly discussed both in direct and cross-examination of witnesses called by both parties, the court upon motion of the defendant properly excluded the document as speculative, R.Tr. 2109; 2182-2183.

The brief of Petitioner has noticeably omitted to state many of the essential facts in this case. The omitted facts are, interestingly, among those which support the verdict in this case. These facts include: (1) at no time did Mead refuse to sell to RWC from its own inventory when RWC paid in advance; (2) RWC never made any attempt to replace Mead with another supplier; (3) even after this lawsuit was initiated Mead permitted RWC to sell to customers whose credit was approved (see D-47); (4) not only did Mead not terminate RWC, but in fact RWC continued operation after the initiation of this lawsuit and was thereby able to reduce its debt to Mead from $70,000 to approximately $8,965.06 at the time of trial (see R.Tr. 1500 and D-95); (5) RWC was never limited to any sales territory by Mead and in fact sold freely and with Mead's knowledge and implicit approval in several areas of California (D-107, p. 2); (6) RWC never made any effort to attract sales in four of the six states (Oregon, Washington, Idaho and Arizona) in which its brief asserts it intended to sell, and upon which its damages exhibits and testimony relied; and (7) four of Mead's witnesses (Messrs. Ordeman, Herbert, Pedersen, and Lindenbaum (see R.Tr. 968-969; R.Tr. 1127-1128; R.Tr. 1254, 1267, 1273-1274, 1276)) denied that any territorial restriction was ever placed upon RWC.

ARGUMENT

A. ISSUES ONE AND TWO: THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE PLAINTIFF'S PROPOSED INSTRUCTION NO. 5 AS IT EMBODIED THE LAW SET FORTH IN GTE SYLVANIA AND IN UNITED STATES v. GENERAL MOTORS CORP.

1. The Trial Court Properly Refused Plaintiff's Proposed Instruction No. 5 As An Incorrect Statement Of The Law Under GTE Sylvania.

It is fundamental that in order to complain of error in refusing to give an instruction, the complaining party must offer a proposed instruction which correctly states the law.[15] Petitioner did not do so in this case. In addi-

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[15] A requested instruction need not be given if it is "only partially correct and was not sufficiently discriminating" among the requesting parties' claims. *Palmer* v. *Hoffman*, 318 U.S. 109, 120 (1943). Such is the case here with Plaintiff's Proposed Instruction No. 5, which is only partially correct (in view of *GTE Sylvania*), and which does not discriminate among Petitioner's claims as to price-fixing and vertical restraints (in the last paragraph of the instruction). "Reviewing the charge as a whole under the traditional standard of review," *Pinkus* v. *United States*, 436 U.S. 293, 297 (1978), the Ninth Circuit correctly concludes that the District Court fully and fairly instructed the jury.

Most of the circuits have adopted the rule that in order for there to be error in refusing to give a requested jury instruction, the proffered instruction must be accurate in every respect. *Southern Ry. Co.* v. *Jones*, 228 F.2d 203, 213 (6th Cir. 1955); *Shaw* v. *Lauritzen*, 428 F.2d 247, 250 (3rd Cir. 1970); *United States* v. *Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). The trial court is not bound to give jury instructions in the form or language requested by the parties, so long as the substance of the requested charge is contained in the instructions given. *Gray* v. *Shell Oil Co.*, 469 F.2d 742, 747-48 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1972) (antitrust action); *Coughlin* v. *Capitol Cement Co.*, 571 F.2d 290, 300 (5th Cir. 1978) (antitrust action); *Coursey* v. *Morgan Driveway, Inc.*, 366 F.2d 504, 508 (6th Cir. 1966); *United States* v. *McCarty*, 440 F.2d 681 (6th Cir. 1971); *Arkwright Mutual Insurance Co.* v. *Philadelphia Electric Co.*, 427 F.2d 1273, 1277 (3d Cir. 1970); *Chavis* v. *Finnlines Ltd.*, 576 F.2d 1072, 1076 (4th Cir. 1978); *Investment Service Co.* v. *Allied Equities Corp.*, 519 F.2d 508, 511 (9th Cir. 1975); *Jeter* v. *St. Regis Paper Co.*, 507 F.2d 973, 978 (5th Cir. 1975); *McGrath* v. *Wallace Murray Corp.*, 496 F.2d 299, 301 (10th Cir. 1974).

[16] Found in the record at C. Tr. 681.

[17] This instruction was given by the District Court at C. Tr. 1047 and R. Tr. 2340-2341.

tion, "jury instructions are to be judged as a whole, rather than by picking isolated phrases from them." *Hamling* v. *United States*, 418 U.S. 87, 108-109 (1974). The test is not whether the charge is faultless in every particular; the test is whether, considering the charge as a whole, the substance of the applicable law was fairly and correctly covered. *Marquis* v. *Chrysler Corp.*, 577 F.2d 624, 636 (9th Cir. 1978). An examination of the Proposed Instruction No. 5 shows that it was adequately covered in the District Court's instructions to the jury.

First, it is important that at trial Petitioner requested only one per se jury instruction, Plaintiff's Proposed Instruction No. 5[16] which Petitioner now has crudely rewritten for this Court's benefit. As submitted to the trial court, Plaintiff's Proposed Instruction No. 5 read in full as follows, with the footnotes showing how the trial court adequately covered each part of this requested instruction:

> "The antitrust laws are intended to foster and preserve our system of free, competitive enterprises, to preserve the fullest practicable competition in the market place, and to prevent the accomplishment of a monopoly in any business or industry.[17]
>
> There are certain agreements or practices, which,

because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively deemed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Territorial restrictions are [sic; probably meant 'and'] resale price fixing are in this category.[18]

A territorial restriction exists where a manufacturer sells its goods to a distributor and then restricts the area in which that distributor can re-sell those products. This, without more, is a violation of the antitrust laws. Such an agreement is illegal whether done only by the manufacturer or whether the manufacturer worked in concert with other distributors.[19]

Resale price fixing occurs when a seller requires the person to whom he has sold goods to re-sell them at a specific price.[20] Territorial restrictions occur when the seller of goods limits or restricts the area in which the person to whom he sold the merchandise can re-sell that merchandise. Customer restrictions occur when a manufacturer prohibits its distributor from re-selling products to certain customers.[21]

If you find such violations here, I instruct you that

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[18] This paragraph was adequately covered by the instruction that a conspiracy to fix prices is in and of itself an unreasonable restraint of trade, and that whether the prices agreed to be fixed were reasonable or unreasonable is immaterial, but the conspiracy to fix prices is of itself an unreasonable restraint of trade. This instruction is quoted in the last two paragraphs of n. 3 of the Ninth Circuit's opinion; and is found in the record at C. Tr. 1072-73 and R. Tr. 2356-57.

[19] This is the *Schwinn* instruction which can no longer be given to a jury in the trial of a Sherman Act § 1 case after this Court's opinion in *GTE Sylvania*.

[20] This instruction was adequately covered by the District Court at C. Tr. 1074 and R. Tr. 2358. See note 16, *supra*.

[21] The District Court adequately covered these definitions as part of its rule of reason instruction concerning restricted territories, found in the record at C. Tr. 1058 and R. Tr. 2348.

the fact that the defendants or the co-conspirators may have had some business justification for their conduct would not constitute a defense. Nor is it a defense in such circumstances that the defendants may have believed that what they were doing is legal or good for business.[22]

Accordingly, should you find from the evidence in this case that the Mead Business & Commercial papers sold to plaintiff, to the other defendants or co-conspirators, or all of them, moved in the course of interstate commerce,[23] and should you further find that the defendant Mead, either alone or in concert with any of the other defendants or co-conspirators, restricted the area in which plaintiff could re-sell B & C papers, or the customers to whom plaintiff could re-sell B & C papers, or that resale prices were maintained, then the defendants would have violated the antitrust laws in the manner charged by the plaintiff,[24] and you must find for the plaintiff."[25]

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[22] Petitioner does not complain of any error concerning the failure or refusal to give this paragraph of the instruction. In any event, the District Court adequately covered these principles when it instructed the jury (1) that a price-fixing conspiracy is in and of itself a reasonable restraint of trade; and (2) that the reasonableness or unreasonableness of the prices agreed to be fixed is immaterial, but that the conspiracy to fix prices in interstate commerce is of itself an unreasonable restraint of trade. These instructions are found in the last two paragraphs of n. 3 of the Ninth Circuit's opinion, and are found in the record at C. Tr. 1072-73 and R. Tr. 2356-57.

[23] There can be no error on the interstate commerce issue because the District Court resolved that issue in Petitioner's favor, and instructed the jury that interstate commerce had been established by the evidence, C. Tr. 1056 and R. Tr. 2347.

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[24] At R. Tr. 2105, the District Judge held a conference with counsel out of the hearing of the jury, and discussed problems with the proposed jury instructions. The District Judge there told Petitioner that instructions like Plaintiff's Proposed Instruction No. 5 (which ends "and you must find for the plaintiff") "are, in effect, directed verdict instructions,

Surprisingly, this entire instruction just quoted has been entirely revised in the Petition for Certiorari; p. 38 of the Petition contains the following incorrect version of the last paragraph of the above-quoted Plaintiff's Proposed Instruction No. 5:

> "[S]hould you[26] find that the defendant Mead, *either alone* or in concert with any of the other defendants or co-conspirators . . . [maintained] resale prices . . . then the defendants would have violated the anti-trust laws in the manner charged by the plaintiff, and you must find for the plaintiff." (Emphasis and [maintained] added in Petition for Certiorari.)

Thus this abbreviated version presented in the Petition entirely eliminates the clauses "restricted the area in which plaintiff could re-sell B & C papers, or the customers to whom plaintiff could re-sell B & C papers, or that resale prices were maintained," and substitutes "[maintained] resale prices" for these clauses. The law is well settled that a party desiring a jury instruction must propose a correct one,[27] and under no stretch of the imagination can Petitioner's Proposed Instruction No. 5 be held to be correct.

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saying if you find this, you must find for so and so," and stated his view of such instructions: if the instructions "say, well if you find this then you must find a verdict for the defendant or for the plaintiff, which I think are perfectly unacceptable." Yet Petitioner did not modify its Instruction No. 5, which this Court has termed "a so-called finding instruction which removed the jury's discretion," *Pinkus* v. *United States*, 436 U.S. 293, 303 (1978).

[25] The price-fixing instructions were given at C. Tr. 1072-73 and R. Tr. 2354-57. The territorial restraint and rule of reason instructions appear at C. Tr. 1057-1059 and R. Tr. 2347-2349.

[26] The Petition eliminates the word "further" that appears at this point in the instruction submitted to the District Court.

[27] See the cases in note 13, *supra*.

Second, Petitioner ignores the fact that the District Court charged the jury that price-fixing is a per se violation. The Court gave the following per se charge on price-fixing:

> "Reno-West Coast also claims that it was terminated as a fine paper's dealer in furtherance of a price-fixing conspiracy involving the defendants. In order to establish this claim plaintiff must show, by a preponderance of the evidence, (1) that Mead and these merchants actually agreed to fix fine paper prices in the west coast area, and (2) that Mead terminated Reno-West Coast as a fine paper's dealer in furterance [sic] of the conspiracy.
>
> A conspiracy to fix prices in or effecting interstate commerce, such as is alleged in the complaint, is in and of itself an unreasonable restraint of trade.
>
> Whether the prices agreed to be fixed were or are reasonable or unreasonable is immaterial, but the conspiracy to fix prices in interstate commerce is of itself an unreasonable restraint of trade." (C. Tr. 1072-73 and R. Tr. 2356-57.)

Petitioner's president Mr. Stillwagon testified that Petitioner adhered to its lower prices, and did not increase its prices in response to any communications or pressure from Respondent Mead Corporation:[28]

> "Q. Mr. Stillwagon, Mr. Herbert, you knew, was the president of Mead Paper Division, didn't you?
>
> A. That's correct.
>
> Q. And he never called you about your prices at any time, did he, sir?
>
> A. No. John did not.

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[28] R. Tr. 546-547. See also R. Tr. 259 and 260 in which this same witness twice said that Petitioner did not increase its prices in response to communications from Respondents.

Q. And you didn't ask anybody at Mead about any conversations that you had about prices with Mr. Pedersen, did you?

A. That's correct.

Q. And you adhered to your lower prices, did you not?

A. Yes, I did."

Therefore the above-quoted jury instruction concerning price-fixing was more than sufficient to cover this aspect of the case. Petitioner's present complaint to this Court that the District Judge erred in refusing also to give Plaintiff's Proposed Instruction No. 5 is frivolous in view of the facts that (1) the District Court did give a per se price-fixing instruction; and (2) Petitioner's principal witness at trial testified that Petitioner did not increase its prices in response to any pressure concerning its pricing.

Third, it is not correct that the District Court erroneously "told the jury that the only way liability could be established was where there was proof of the *horizontal* price fixing agreement between all the defendants."[29] In fact, the above-quoted per se price-fixing instruction is not by its terms limited to a horizontal price-fixing agreement.

Fourth, Plaintiff's Proposed Instruction No. 5 was supported at trial by the per se rule of *Schwinn*.[30] At p. 41 of the Petition for Certiorari, Petitioner again calls Plaintiff's Proposed Instruction No. 5 its "combined *Schwinn/General Motors* instruction." In the United States Court of Appeals for the Ninth Circuit, Petitioner framed this first issue on appeal as an alleged error in refusing to give

[29] Petition for Certiorari at p. 38 (emphasis in Petition).

[30] *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). See C. Tr. 683, the list of citations supporting Plaintiff's Proposed Instruction No. 5, which includes the *Schwinn* citation.

the *Schwinn* per se instruction.[31] Yet this Court in *GTE Sylvania* expressly overruled the *Schwinn* per se rule. See *GTE Sylvania*, 433 U.S. at 58, in which this Court stated "we conclude that the per se rule stated in Schwinn must be overruled." There is no sense in ordering a retrial of the instant action based upon the District Court's refusal to give a *Schwinn* per se instruction when such a retrial again would have to be under the rule of reason standards enunciated in *GTE Sylvania*.

2. The District Court Properly Refused Plaintiff's Proposed Instruction No. 5 Insofar As That Proposed Instruction Relied Upon United States v. General Motors Corp.

Petitioner now complains to this Court that its Instruction No. 5 was improperly rejected because Petitioner tried its case on a horizontal theory under *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966).[32] It is incorrect to state that Petitioner tried its case on a horizontal theory. Petitioner agreed with the Court in a discussion concerning jury instructions that Petitioner had not requested any jury instruction on a horizontal conspiracy to allocate territories:[33]

[31] At pp. 1-2 of its Appellant's Opening Brief in the Ninth Circuit, Petitioner framed the issue presented for review as whether the District Court erred in "refusing to instruct the jury that restrictions imposed by defendant-appellee The Mead Corporation" as set forth in Proposed Instruction No. 5 "constituted *per se* violations of Section 1 of the Sherman Act under the rule set forth in United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967)."

[32] Petition for Certiorari at pp. 42-43.

[33] This quotation is from R. Tr. 2377; it was quoted at p. 20 of the Brief of Appellees in the Ninth Circuit.

"THE COURT: I rewrote a couple of the defendants' instructions. I rewrote one of yours. I put one in on Schwinn. *There was no requested instruction on the horizontal conspiracy in territorial restraint; just on price.*
MR. SCARPULA: That's correct." (Emphasis added.)

Hence when the Court stated that the *United States* v. *General Motors Corp.* horizontal territorial conspiracy instruction had not been requested, Petitioner agreed. The price-fixing instruction was given by the Court, as noted previously in this Brief at p. 15 n. 22. Therefore to the extent that Petitioner complains of the District Court's refusal to give a requested horizontal instruction, Petitioner has no legitimate claim of error, since the District Court was told by Petitioner that it was not requesting an instruction on horizontal territorial restraints.

Not only did Petitioner agree with the trial court that it had not requested a horizontal territorial instruction, but it also told the trial court that its case was not based upon horizontal price-fixing. These statements are contained in the Plaintiff's Objections to the Defendants' Proposed Jury Instructions.[34] In objecting to various jury instructions proposed by defendants at trial, Petitioner stated in its written objections filed with the District Court that it neither alleged nor proved horizontal price-fixing:

"21. Plaintiff objects to Instruction No. 45 on the grounds that it mis-states the theory of plaintiff's case and was therefore prejudicial and erroneous because *plaintiff did not offer to prove that it was terminated in furtherance of any price fixing conspiracy.*

[34] These objections are Exhibit 5 to the Appellant's Opening Brief in the Ninth Circuit, and appear in the record at C. Tr. 731 and 732.

22. Plaintiff objects to Instruction No. 46 on the grounds that *no horizontal price fixing agreement involving defendant Mead was alleged in plaintiff's complaint nor any evidence offered of such an agreement* and therefore was prejudicial and erroneous.

23. Plaintiff objects to Instruction No. 47 on the grounds that *there was no allegation or evidence of a horizontal price fixing agreement involving the defendant Mead,* and therefore the instruction was confusing, prejudicial and erroneous. Plaintiff objects further to this instruction on the ground that it mis-states the law." (Emphasis added.)

Therefore Petitioner repeatedly told the trial court that it was not relying upon horizontal price-fixing, and as the above-quoted colloquy on the record with the court shows, Petitioner then told the District Court that it had not requested a per se horizontal territorial instruction. These quotations from the record were not simply discussions at preliminary pretrial conferences, or papers filed prior to trial. These were conversations with the District Judge during trial concerning the jury instructions, and a paper Petitioner filed at trial concerning the jury instructions, in which the Petitioner is informing the District Court what theories were not in the case. Yet Petitioner now complains of a failure to give one paragraph (the last paragraph of Plaintiff's Proposed Instruction No. 5), which it chooses to label a horizontal instruction. Again as this Court held in *Hamling* v. *United States,* 418 U.S. 87, 108-109 (1974), "jury instructions are to be judged as a whole, rather than by picking isolated phrases from them."

Even assuming that Petitioner can change its theories on appeal to this Court, the case of *United States* v. *General Motors Corp.,* 384 U.S. 127 (1966) is not applicable to the instant case, for several reasons. First, *General Motors*

did not involve territorial restrictions, but only price restrictions. 384 U.S. at 139-140. Second, *General Motors* involved purely horizontal restraints. The en banc opinion of the Ninth Circuit which was affirmed by this Court in *GTE Sylvania* recognized that *General Motors* "held the conduct of General Motors and its dealers unlawful *solely on the basis of a horizontal conspiracy among dealers* to prevent sales to discounters." *GTE Sylvania Inc.* v. *Continental T.V., Inc.*, 537 F.2d 980, 993 (9th Cir 1976) (emphasis added). In addition, footnote 28 of this Court's opinion in *GTE Sylvania* cited *General Motors* for the proposition that "horizontal restrictions originating in agreements among retailers" remain illegal per se, 433 U.S. at 58 n. 28.[35]

Third, *General Motors* involved an unlawful refusal to deal: the *General Motors* dealers who were defendants had refused to deal with discounters, 384 U.S. at 135-138 and 145-146. In contrast, Respondent Mead Corporation in this action did not refuse to deal with Petitioner. R. Tr. 986, 1440-1500. Plaintiff's Objections to Defendants' Proposed Jury Instructions stated that at trial "plaintiff did not offer to prove that it was terminated in furtherance of any price fixing conspiracy."[36]

In summary, Petitioner is attempting on appeal to fit its case within *General Motors*, since its reliance at trial

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[35] See also the definition of a horizontal restraint in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608 (1972).

[36] This is objection 21 of Plaintiff's Objections to Defendants' Proposed Jury Instructions, found in the record at C. Tr. 731. Indeed, Petitioner's various complaints in this action use the term "vertical conspiracy" repeatedly. See ¶ 16 of the original complaint in this action, R. Tr. 5; ¶ 18 of the amended complaint in this action, R. Tr. 104; and ¶ 18 of the supplemental and amended complaint in this action, R. Tr. 405.

upon the per se rule of *Schwinn* has been completely undercut by *GTE Sylvania*. This action was not tried as a horizontal conspiracy case, and Petitioner repeatedly represented to the District Court, and agreed with the District Court, that Petitioner was not pursuing a horizontal conspiracy theory, either as to territorial or as to price restraints.

B. ISSUE THREE: THE NINTH CIRCUIT DID NOT ERR IN HOLDING THAT THE DISTRICT COURT PROPERLY TRIED THIS ACTION UNDER THE EN BANC NINTH CIRCUIT OPINION IN GTE SYLVANIA, WHICH EN BANC OPINION WAS DELIVERED OVER FIVE MONTHS BEFORE THE TRIAL OF THIS ACTION IN SEPTEMBER-OCTOBER, 1976.

This issue was not presented to the Ninth Circuit. Petitioner now argues[37] that to hold that Plaintiff's Proposed Instruction No. 5 was properly rejected penalizes Petitioner for failing to anticipate this Court's reversal of the *Schwinn* per se rule, in *GTE Sylvania*. Such an argument is fallacious for three reasons.

First, the relevant dates show that Petitioner's argument must fail. *Schwinn* was decided in 1967, and much criticised in subsequent years. See the cases and authorities collected in *GTE Sylvania*, 433 U.S. at 48 nn. 13 and 14. The *GTE Sylvania* opinion stated that: "The great weight of scholarly opinion has been critical of the decision, and

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[37] Question 3 of the Questions Presented at pp. 4-5 of the Petition for Certiorari.

a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach." 433 U.S. at 48 (footnotes omitted). On April 9, 1976, the Ninth Circuit delivered its en banc opinion in *GTE Sylvania, Inc.* v. *Continental T.V., Inc.*, 537 F.2d 980 (9th Cir. 1976). The instant action was tried in September and October 1976, *over five months after* the Ninth Circuit's *GTE Sylvania* opinion, when that opinion was the most recent Ninth Circuit opinion (and the only en banc opinion) on the continuing validity and application of the *Schwinn* per se rule. Hence this Court's subsequent affirmance of the Ninth Circuit en banc opinion could hardly have shocked Petitioner or denied Petitioner's alleged due process rights[38] by requiring Petitioner to "have anticipated, or second-guessed, this Court's *GTE-Sylvania* decision," Petition for Certiorari at p. 67.

Second, it is fundamental that an appellate court applies the law in effect at the time it renders its decision, *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696, 711 (1974); *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 281 (1969). Therefore the Ninth Circuit properly applied this Court's *GTE Sylvania* analysis to this case, because this Court's *GTE Sylvania* opinion was the law in effect at the time of the decision by the Ninth Circuit. Indeed, at least four Circuit Courts of Appeals have resolved questions quite similar to that presented in the instant case: should the results in cases tried when *Schwinn* was the law be changed on appeal, when the appellate courts are dealing with those cases at a time when the *Schwinn* per se rule was overruled by this Court in *GTE Sylvania*?

The First Circuit in *Eastern Scientific Co.* v. *Wild Heer-*

[38] As Petitioner argues at pp. 62-65 of the Petition for Certiorari.

brugg Instruments, Inc., 572 F.2d 883 (1st Cir. 1978) held that where the district court had instructed the jury that a distributor's conduct amounted to a per se violation of the Sherman Act, and where the Supreme Court decision in *GTE Sylvania* overruled the per se rule of *Schwinn* after the district court's instruction, a new trial was warranted in a case in which the jury had found in favor of the plaintiff. "GTE Sylvania overruled this per se rule and instructed courts to apply a rule of reason standard in evaluating territorial restrictions." 572 F.2d at 884. In the instant case Judge Spencer Williams did give a rule of reason instruction.

The Second Circuit in *National Auto Brokers Corp.* v. *General Motors Corp.*, 572 F.2d 953 (2d Cir. 1978) also dealt with a situation in which the plaintiff-appellant "relied below" upon the per se rule in *Schwinn*, 572 F.2d at 960. The court held:

> "Although *Continental T.V., Inc., supra,* was not decided by the Supreme Court until after the conclusion of trial of the present case, we are bound to apply its principles rather than the earlier *per se* rule of *Schwinn*. See *Cort* v. *Ash* 422 U.S. 66, 74-77." 572 F.2d at 960 (emphasis in original).

The Fifth Circuit in *Florida Harvestore, Inc.* v. *A. O. Smith Harvestore Products, Inc.*, 1977-2 CCH Trade Cases ¶ 61,679 (5th Cir. 1977) vacated and remanded a $105,000 damage award obtained by a plaintiff on a territorial restrictions claim that was tried before this Court's opinion in *GTE Sylvania*.

The Seventh Circuit in *General Beverage Sales Co.* v. *East-Side Winery*, 568 F.2d 1147 (7th Cir. 1978) reversed and remanded for a new trial a case in which a plaintiff obtained a judgment of $1,307,401.75, when this Court's

GTE Sylvania opinion had been handed down about eight months after the conclusion of the jury trial in that action. 568 F.2d at 1151. The court there had given a *Schwinn* per se instruction such as that requested by Petitioner in this case. 568 F.2d at 1152. The court first held: "We are of course required to decide this case on the basis of existing law rather than according to the law that existed at the time of the decision below." 568 F.2d at 1151-52.

The Seventh Circuit then held that in view of this Court's *GTE Sylvania* opinion, the district court's *Schwinn* per se instruction was reversible error which could not be considered harmless, and that the defendants' failure to object to the per se instruction (in the instant case Respondents did object to the per se instruction, Plaintiff's Proposed Instruction No. 5, and it was not given) did not preclude consideration of the propriety of the instruction on appeal. 568 F.2d at 1152, 1154.

Finally, the Tenth Circuit in *Adolph Coors Co.* v. *A & S Wholesalers, Inc.*, 561 F.2d 807 (10th Cir. 1977) held that this Court's *GTE Sylvania* opinion must be applied by the Tenth Circuit in reviewing a district court decision reached when *Schwinn* was the law, 571 F.2d at 809-810. In that case, as in the instant case, the appellant contended "that the trial court erred in failing to instruct the jury that Coors' efforts at firm and resolute enforcement of territorial restrictions on the resale of its products constituted a *per se* violation of Section 1 of the Sherman Act." 561 F.2d at 812 (emphasis in original). However the Tenth Circuit rejected that contention, holding that this Court's *GTE Sylvania* opinion "disposes of this issue adversely to" the party who wanted the *Schwinn* instruction. 561 F.2d at 812.

In summary, the cases reported after this Court's *GTE Sylvania* opinion show that the District Court in this action

correctly refused to give Plaintiff's Proposed Instruction No. 5.

Third, Petitioner incredibly suggests at p. 67 of the Petition that "the District Court did not allow Petitioner – or Respondents for that matter – to review those instructions prior to giving them to the jury." This statement is inaccurate. The following excerpt from the record (R. Tr. 2376)

> "THE COURT: One further request of counsel. Do either of you have instructions that you would wish to give at this time that we have not given?
>
> MR. GILLIAM: No, Your Honor.
>
> MR. SCARPULLA: No, Your Honor.
>
> THE COURT: Fine."

Thus both sides had the opportunity Petitioner now denies, and the record nowhere contains an objection by Petitioner to any action of the District Court in refusing to let the parties see the jury instructions. Both parties in fact worked with both the District Judge and his law clerk on the jury instructions.

C. ISSUE FOUR: THE DISTRICT COURT DID NOT ERR IN REFUSING TO ALLOW PETITIONER'S PRESIDENT TO TESTIFY AS AN EXPERT, WHEN THE DISTRICT COURT DID PERMIT (1) PETITIONER'S PRESIDENT TO TESTIFY AS A LAYMAN BOTH AS TO THE THEORY AND NUMBERS INVOLVED IN THE ALLEGED DAMAGES, AND (2) A Ph.D. FROM THE UNIVERSITY OF MICHIGAN TO TESTIFY AS AN EXPERT CONCERNING BOTH THE THEORY AND NUMBERS INVOLVED IN THE ALLEGED DAMAGES.

It is important to clarify the issue before this Court under this question presented: the issue is only whether the District Court erred (*i.e.*, whether it abused its discretion) in refusing to let Petitioner's president Mr. Stillwagon wear the mantle of an expert. The issue is not whether the District Court erroneously refused to let Mr. Stillwagon testify at all concerning his damage theory or the numbers involved in it. The statement at p. 69 of the Petition for Certiorari that "the District Court prevented Stillwagon from testifying as to how Petitioner's damage theory was developed or what factors were considered to arrive at the amount of damages" is false.

First, Mr. Stillwagon was permitted by the District Court to testify as a layman on both the damage theory and on the numbers involved in the theory. Specifically, Mr. Stillwagon testified as to the theory followed in making the damage study.[39] The trial court simply ruled that Mr.

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[39] At R. Tr. 351, Petitioner's president testified fully on the theory involved in making the damages:

> "MR. SCARPULLA: Q. Now, Mr. Stillwagon, before we get into a more detailed analysis of the damage study, would you please tell the Court and the jury what the philosophy was behind projecting these damages into other areas?
>
> A. The philosophy was that we would calculate what share of the market we had been able to attain in Nevada, and then project, based on that share, into the other states where we were not allowed to compete.
>
> We also made estimates of the growth rate and sales of every one of the states that we were talking about and the growth rate in Nevada.
>
> Essentially, we were making an estimate of what our share of the market was and then using that to project other shares of markets that we could have attained if we would have been allowed to go where we were not allowed to go.
>
> Q. Was that information then programmed into a computer, the various shares that were projected?
>
> A. The various shares, along with growth rates by state and estimates of contribution and estimates of our fixed expenses in selling in most of those states."

Stillwagon could not testify *as an expert,* R. Tr. 378, 444, 363, and 2074. Mr. Stillwagon was permitted to testify to the percent of the market Petitioner supposedly obtained in Nevada, the percent of the market Petitioner would have obtained in other states, the gross receipts from such sales, the profits from such sales, and so on. R. Tr. 499 *et seq.*

Second, the ruling that Mr. Stillwagon could not testify as an expert was totally within the trial court's discretion. *Salem* v. *United States Lines Co.,* 370 U.S. 31, 35 (1962):

> "Furthermore, the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous."

This principle was reaffirmed in *Hamling* v. *United States,* 418 U.S. 87, 108 (1974), which stated that "the District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the

case of expert testimony." *Accord*: *Marquis* v. *Chrysler Corp.*, 577 F.2d 624, 636-637 (9th Cir. 1978).[40]

Fourth, Petitioner's expert Dr. Haessler from the University of Michigan testified in full as to both the theory and numbers involved in Petitioner's alleged damages. The District Judge accepted Dr. Haessler as an expert, R. Tr. 708, and Petitioner then proceeded to elicit a number of expert opinions as to the method of computing future damages, R. Tr. 713, 715-16, 718, 719, 722, 729-30, and 731. Dr. Haessler testified in full that "the method was completely proper,"[41] and that he had reviewed all of the figures involved in the damages exhibits. R. Tr. 718, 722, 729-31. Hence there can be no error in limiting Mr. Stillwagon to testifying as a layman, in view of the fact that Petitioner had the benefit of a qualified expert at trial.

Finally, Petitioner's claim before this Court that it did not have the benefit of Mr. Stillwagon's testimony as to the theory of damages is belied by Petitioner's closing argument to the jury, R. Tr. 2252-53, in which the jury was reminded that Mr. Stillwagon did indeed testify fully as to the damage theory:

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[40] In the Petition for Certiorari at pp. 68-69, 70 and 74-75, Petitioner places great reliance upon *Pacific Coast Agricultural Export Association* v. *Sunkist Growers, Inc.*, 526 F.2d F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). However, *Sunkist* only held that properly qualified experts can testify using projections. In that case two experts testified, 526 F.2d at 1206, and the court found that "Plaintiffs' expert witnesses who testified at the trial on damages were properly qualified," 526 F.2d at 1207. Respondents here have no quarrel with the *Sunkist* opinion; in the instant case Mr. Stillwagon was simply not properly qualified, and the Court so found. See R. Tr. 369-70, in which the District Judge in this action dealt with the *Sunkist* case and stated that the question before him was not whether projections could be used, but rather whether *this witness* (Mr. Stillwagon) could make such projections *as an expert*.

[41] R. Tr. 731.

> "We have heard testimony by Mr. Stillwagon that as the president of Reno-West Coast he has suffered injury, and the injury that he has suffered has been due only, he testified to that, only to the acts of the defendants.
>
> That was the testimony. Now, I have done a computation of the damages which were testified to by Mr. Stillwagon.
>
> *He told you how he did it. He said, I knew what my share of the Nevada market was. Now, based on my experience as a business man and president* of Reno-West Coast, *I think I could get a share of the California market,* the market from which I was excluded. And I think I could get a share of the Oregon market, the market from which I was excluded. And I think I could get a share of the Washington market, the market from which I was excluded. And I think I could get a share of the Idaho market, the market from which I was excluded. I think I could get a share of the Arizona and Utah and other markets from which I was excluded." (Emphasis added.)

Therefore, Petitioner's claim of error by the exclusion of testimony as to the theory of damages is frivolous.

CONCLUSION

For the foregoing reasons, Mead respectfully requests that this Court deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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